

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/1. THE LAW OF ARBITRATION/(1) INTRODUCTION/1201. Definition.

ARBITRATION (VOLUME 2 (2008) 5TH EDITION)

1. THE LAW OF ARBITRATION

(1) INTRODUCTION

1201. Definition.

Arbitration is a process used by the agreement of the parties to resolve disputes. In arbitrations, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it¹. The decision of the arbitral tribunal is usually called an award.

¹ Thus industrial dispute arbitrations, for example, are not always arbitrations in this sense, but may be a form of conciliation or mediation by which the third person assists the disputing parties to reach an agreement.

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1202. Sources of arbitration law.

The sources of English arbitration law are statute, international conventions and the common law.

The United Nations Commission on International Trade Law (UNCITRAL) produced a Model Law on International Commercial Arbitration in 1985¹. In 1989 the Departmental Advisory Committee on Arbitration Law recommended that instead of England, Wales and Northern Ireland adopting the UNCITRAL Model Law, there should be enacted a new Act to embody both the existing statutory law on arbitration and the relevant common law principles². The Committee also recommended that the new Act should follow, as far as possible, the structure and language of the UNCITRAL Model Law³. Seven years later this recommendation was implemented in the Arbitration Act 1996⁴.

The Arbitration Act 1996 repealed almost all existing statutes governing the law of arbitration, including Part I of the Arbitration Act 1950⁵ (which was itself a consolidation of earlier arbitration legislation), the Arbitration Act 1975 (which was the enabling legislation for the United Kingdom's⁶ treaty obligations under the New York Convention (1958)⁷), the Arbitration Act 1979 (which abolished the 'case stated' procedure and replaced it with a limited right of appeal on points of law), and the Consumer Arbitration Agreements Act 1988⁸. It consolidates earlier enactments, codifies principles established by recent case law, introduces changes designed to improve the fairness, speed and cost-effectiveness of arbitration and incorporates certain provisions of the UNCITRAL Model Law⁹. In consequence, any work on the English law of

arbitration is dominated by the provisions of the Arbitration Act 1996, with which this title is primarily concerned¹⁰.

Arbitration has always been of particular use as a mechanism for resolving disputes relating to international commercial transactions. In order to promote the effectiveness of international arbitration it has been necessary for participating countries to co-operate to ensure that arbitral awards can be enforced outside the territory in which they were made. This has been achieved through Conventions, the most important of which are the Geneva Convention (1927)¹¹ and the New York Convention (1958). The Geneva Convention (1927) is given effect in English law by Part II of the Arbitration Act 1950¹², and the New York Convention (1958) by the Arbitration Act 1996¹³.

1 Note that the UNCITRAL Model Law was modified in 2006.

2 See the Departmental Advisory Committee on Arbitration Law *Report on the Arbitration Bill* (February 1996) para 1.

3 See note 2.

4 The Arbitration Act 1996 s 91 (so far as it relates to the power to make orders under s 91), s 105, s 107(1) and Sch 3 para 36 (so far as relating to the provision that may be made by county court rules), s 107(2) and the reference in Sch 4 to the County Courts (Northern Ireland) Order 1980, SI 1980/397 (so far as relating to the provision that may be made by county court rules), and the Arbitration Act 1996 ss 108-110 were brought into force on 17 December 1996: s 109; Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146, art 2, Sch 1. The remainder of the provisions of the Arbitration Act 1996, except ss 85-87, were brought into force on 31 January 1997: s 109; Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146, art 3.

The provisions of the Arbitration Act 1996 extend to England and Wales and, except s 92 (exclusion of Pt I (ss 1-84) in relation to small claims arbitration in the county court) and s 93, Sch 2 (appointment of judges as arbitrators), to Northern Ireland: s 108(1), (2). Sections 89, 90, 91 (consumer arbitration agreements) extend to Scotland and the provisions of Sch 3 (consequential amendments), Sch 4 (repeals) extend to Scotland so far as they relate to enactments which so extend, except that the repeal of the Arbitration Act 1975 extends only to England and Wales and Northern Ireland: Arbitration Act 1996 s 108(3), (4).

The passage into law of the Arbitration Act 1996 was significant in that previously legislation consisted largely of mandatory provisions, although discretionary powers were also conferred. However, the Arbitration Act 1996 often uses the permissive expression 'the parties are free to agree'.

The Arbitration Act 1996 is applied with modifications by the ACAS Arbitration Scheme (Great Britain) Order 2004, SI 2004/753: see **EMPLOYMENT** vol 40 (2009) PARA 779.

5 I.e. the Arbitration Act 1950 Pt I (ss 1-34) (repealed).

6 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706 preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man is within the United Kingdom. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 3.

7 I.e. the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958 (New York, 10 June 1958; Cmnd 6419): see PARA 1289 note 3.

8 See the Arbitration Act 1996 s 107(2), Sch 4. For a historical survey of the development of the statutory law of arbitration see Lord Mustill and Stewart C Boyd QC *Commercial Arbitration* (2nd Edn, 1989) Ch 29.

9 See the long title to the Arbitration Act 1996, which indicates that it is 'An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes'. Note that, whereas the UNCITRAL Model Law applies only to international commercial arbitration, the Arbitration Act 1996 applies to all arbitrations irrespective of party identity and subject matter.

10 See PARA 1203.

11 I.e. the Convention on the Execution of Foreign Arbitral Awards signed at Geneva on 26 September 1927. The Geneva Convention (1927) is set out in the Arbitration Act 1950 Sch 2: see PARA 1288.

12 le the Arbitration Act 1950 Pt II (ss 35-42): see PARA 1288. This is, however, largely redundant.

13 See the Arbitration Act 1996 s 101; and PARA 1290 et seq.

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1203. Scope of the title.

This title is concerned primarily with the law relating to the Arbitration Act 1996 (the 'new law')¹. The 'old law' means various enactments² amended and repealed by the Arbitration Act 1996, as they stood before their amendment or repeal by that Act³.

The old law applies to:

- (1) arbitral proceedings commenced before 31 January 1997⁴;
- (2) arbitration applications⁵ commenced or made before 31 January 1997⁶; and
- (3) arbitration applications commenced or made on or after 31 January 1997 relating to arbitral proceedings commenced before 31 January 1997⁷,

and the provisions of the Arbitration Act 1996 which would otherwise be applicable do not apply⁸. The provisions of Part 62 of the Civil Procedure Rules relating to arbitration claims other than under the Arbitration Act 1996⁹ contain rules about arbitration claims to which the old law applies¹⁰. For these purposes, 'arbitration claim' means any application to the court under the old law and includes an appeal (or application for permission to appeal) to the High Court on any question of law arising out of an award made on an arbitration agreement¹¹. The detail of the old law is not set out in this title.

The provisions of the Arbitration Act 1996¹² apply to any other arbitration claim¹³.

1 See PARA 1202.

2 le the enactments are specified in the Arbitration Act 1996 s 107, Schs 3, 4.

3 See the Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146, art 4, Sch 2 para 1(c); and CPR 62.11(2)(a). See also PARA 1202.

4 Arbitration Act 1996 s 84(3); Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146, Sch 2 para 2(a). The date referred to in the text is the date on which the Arbitration Act 1996 was largely brought into force: see the Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146, art 3, Sch 2 para 1(a); and PARA 1202 note 4. Almost no cases still pass through the courts concerning arbitral proceedings commenced before 31 January 1997.

5 'Arbitration application' means any application relating to arbitration made by or in legal proceedings, whether or not arbitral proceedings have commenced: Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146, Sch 2 para 1(b).

6 Arbitration Act 1996 s 84(3); Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146, Sch 2 para 2(b).

7 Arbitration Act 1996 s 84(3); Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146, Sch 2 para 2(c).

8 Arbitration Act 1996 s 84(3); Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146, Sch 2 para 2. In the application of the Arbitration Act 1996 s 46(1)(b) (provision for dispute to be decided in accordance with provisions other than law: see PARA 1208) to an arbitration agreement made before 31 January 1997, the agreement has effect in accordance with the rules of law (including any conflict of laws rules) as they

stood immediately before that date: Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146, Sch 2 para 4. As to conflict of laws generally see **CONFLICT OF LAWS**.

9 le CPR Pt 62 Section II (rr 62.11-62.16).

10 CPR 62.11(1). The provisions of Pt 62 Section II do not apply to a claim to which Pt 62 Section III (rr 62.17-62.21) (see **PARAS** 1275, 1292-1293, 1307) applies, or to a claim on the award: CPR 62.11(3).

11 CPR 62.11(2)(b). The text refers to an appeal (or application for permission to appeal) under the Arbitration Act 1979 s 1(2) (now repealed). A claim seeking permission to appeal under s 1(2) (now repealed), under s 1(5) (now repealed) (including any claim seeking permission), or under s 5 (now repealed), must be made in the High Court and will be heard by a judge of the Commercial Court unless any such judge directs otherwise: CPR 62.12.

An arbitration claim to which the old law applies must be started in the Commercial Court and, where required to be heard by a judge, must be heard by a judge of that court unless he otherwise directs: *Practice Direction--Arbitration* PD62 paras 13.1, 14.1. An arbitration claim must be started by the issue of an arbitration claim form in accordance with the Part 8 procedure (alternative procedure for starting claims: see **CIVIL PROCEDURE** vol 11 (2009) **PARA** 127 et seq): CPR 62.13(1). However, where an arbitration claim is to be made in existing proceedings it must be made by way of application notice, and any reference in CPR Pt 62 Section II to an arbitration claim form includes an application notice: CPR 62.13(2). The arbitration claim form in an arbitration claim under the Arbitration Act 1979 s 1(5) (now repealed) (including any claim seeking permission) must be served on the arbitrator or umpire, and any other party to the reference: CPR 62.13(3).

If a claim is to be made under the Arbitration Act 1950 s 12(4) (now repealed) for an order for the issue of a witness summons to compel the attendance of the witness before an arbitrator or umpire, and the attendance of the witness is required within the district of a district registry, the claim may be started in that registry: CPR 62.14.

An arbitration claim to remit an award under the Arbitration Act 1950 s 22 (now repealed), to set aside an award under s 23(2) (now repealed) or otherwise, or to direct an arbitrator or umpire to state the reasons for an award under the Arbitration Act 1979 s 1(5) (now repealed), must be made, and the arbitration claim form served, within 21 days after the award has been made and published to the parties: CPR 62.15(1). An arbitration claim to determine any question of law arising in the course of a reference under the Arbitration Act 1979 s 2(1) (now repealed) must be made, and the arbitration claim form served, within 14 days after the arbitrator or umpire gave his consent in writing to the claim being made, or the other parties so consented: CPR 62.15(2). An appeal under the Arbitration Act 1979 s 1(2) (now repealed) must be filed, and the arbitration claim form served, within 21 days after the award has been made and published to the parties: CPR 62.15(3). Where reasons material to an appeal under the Arbitration Act 1979 s 1(2) (now repealed) are given on a date subsequent to the publication of the award, the period of 21 days will run from the date on which reasons are given: CPR 62.15(4). In every arbitration claim to which CPR 62.15 applies, the arbitration claim form must state the grounds of the claim or appeal; where the claim or appeal is based on written evidence, a copy of that evidence must be served with the arbitration claim form; and where the claim or appeal is made with the consent of the arbitrator, the umpire or the other parties, a copy of every written consent must be served with the arbitration claim form: CPR 62.15(5). In an appeal under the Arbitration Act 1979 s 1(2) (now repealed):

(1) a statement of the grounds for the appeal specifying the relevant parts of the award and reasons (CPR 62.15(6)(a)); and

(2) where permission is required, any written evidence in support of the contention that the question of law concerns a term of a contract, or an event, which is not a one-off term or event (CPR 62.15(6)(b)),

must be filed and served with the arbitration claim form (CPR 62.15(6)). Any written evidence in reply to written evidence under head (2) must be filed and served on the claimant not less than two days before the hearing: CPR 62.15(7). A party to a claim seeking permission to appeal under the Arbitration Act 1979 s 1(2) (now repealed) who wishes to contend that the award should be upheld for reasons not expressed or fully expressed in the award must file and serve on the claimant, a notice specifying the grounds of his contention not less than two days before the hearing: see CPR 62.15(8).

Any arbitration claim form in an arbitration claim under the Arbitration Act 1950 or the Arbitration Act 1979, or any order made in such a claim, may be served out of the jurisdiction with the permission of the court if the arbitration to which the claim relates is governed by the law of England and Wales, or has been, is being, or will be, held within the jurisdiction: CPR 62.16(1). However, an arbitration claim form seeking permission to enforce an award may be served out of the jurisdiction with the permission of the court whether or not the arbitration is governed by the law of England and Wales: CPR 62.16(2). An application for permission to serve an arbitration claim form out of the jurisdiction must be supported by written evidence stating the grounds on which the application is made, and showing in what place or country the person to be served is, or probably may be found: CPR 62.16(3). The rules relating to the method of service where a claim form is to be served out of the jurisdiction (see CPR 6.24; and **CIVIL PROCEDURE** vol 11 (2009) **PARA** 173), service through foreign governments,

judicial authorities and British consular authorities (see CPR 6.25-6.26; and **CIVIL PROCEDURE** vol 11 (2009) PARAS 175-176), service in accordance with EC Council Regulation 1348/2000 (OJ L160, 30.06.2000, p 37) on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (see CPR 6.26A; and **CIVIL PROCEDURE** vol 11 (2009) PARAS 157 et seq, 174), service of a claim form on a state (see CPR 6.27; and **CIVIL PROCEDURE** vol 11 (2009) PARA 177), the translation of a claim form (see CPR 6.28; and **CIVIL PROCEDURE** vol 11 (2009) PARA 178), and the undertaking to be responsible for expenses of the Foreign and Commonwealth Office (see CPR 6.29; and **CIVIL PROCEDURE** vol 11 (2009) PARA 179), apply to the service of an arbitration claim form under CPR 62.16(1): CPR 62.16(3). An order giving permission to serve an arbitration claim form out of the jurisdiction must specify the period within which the defendant may file an acknowledgment of service: CPR 62.16(5). As to the Foreign and Commonwealth Office see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 459 et seq.

An application for permission under the Arbitration Act 1950 s 26 (now repealed) (enforcement of award on an arbitration agreement) or the Arbitration Act 1975 s 3(1)(a) (now repealed) (enforcement of Convention award) to enforce an award in the same manner as a judgment or order may be made without notice in an arbitration claim form: CPR 62.18(1)(c), (d). Such an application for permission must be supported by written evidence:

- (a) exhibiting (i) where the application is made under the Arbitration Act 1950 s 26 (now repealed), the arbitration agreement and the original award (or copies) (see CPR 62.18(6)(a)(i)); (ii) where the application is made under the Arbitration Act 1975 s 3(1)(a) (now repealed), the documents required to be produced by s 4 (now repealed) (evidence) (CPR 62.18(6)(a)(iii));
- (b) stating the name and the usual or last known place of residence or business of the claimant and of the person against whom it is sought to enforce the award (CPR 62.18(6)(b)); and
- (c) stating either that the award has not been complied with, or the extent to which it has not been complied with at the date of the application (CPR 62.18(6)(c)).

As to the procedure for enforcement of such awards see CPR 62.18(2)-(5), (7)-(11); and PARAS 1275, 1292. As to the application of CPR Pt 62 Section III (rr 62.17-62.21) see PARA 1275 note 2.

12 le brought into force by the Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146: see PARA 1202.

13 Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146, Sch 2 para 3.

UPDATE

1203 Scope of the title

NOTE 11--Regulation 1348/2000 repealed and replaced by European Parliament and EC Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (service of documents).

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1204. Alternative dispute resolution.

Alternative dispute resolution ('ADR') is a term for describing the processes of resolving disputes in place of litigation and includes mediation, conciliation, expert determination, and early neutral evaluation¹. It is not unusual for arbitration to be classed as a form of ADR, but this is potentially misleading. In many important respects arbitration has more in common with court-based litigation than with the forms of ADR listed above. Unlike arbitration, none of these forms of ADR has a statutory basis.

Mediation and conciliation require an independent third party (a 'mediator' or 'conciliator') to assist the parties to settle their dispute. Expert determination requires an independent expert in the subject of the disagreement to decide the case. The expert is chosen jointly by the parties and his decision is binding². Early neutral evaluation requires a neutral professional to give an appraisal of the merits of the case. The appraisal is non-binding.

The parties may agree a contract that includes a tiered dispute resolution clause, which enables the parties to escalate any dispute through the various levels. Thus a dispute that is not resolved by direct negotiation can be taken to mediation; if mediation is unsuccessful then the dispute can be taken to arbitration; and if arbitration is unsuccessful there is still the possibility of litigation.

ADR is a suitable alternative to litigation for many disputes. The use of ADR in place of litigation is promoted by the Civil Procedure Rules, the courts, and the government.

The Civil Procedure Rules contain a procedural code with the overriding objective of enabling the court to deal with cases justly³. The court must further the overriding objective by actively managing cases⁴, and this includes encouraging the parties to use an ADR procedure if the court considers that appropriate, and facilitating the use of such a procedure⁵. Failure by the parties to do so may place the party who refuses to consider ADR at risk of adverse consequences in costs⁶.

The Commercial Court encourages the use of ADR in appropriate cases, including mediation, conciliation and (non-binding and without prejudice) early neutral evaluation by a Commercial Court judge⁷.

The government is committed to settling legal disputes by ADR methods whenever the other party agrees to it⁸. The Lord Chancellor has said that there are often 'alternative ways of settling the issues at stake which are simpler, cheaper, quicker and less stressful to all concerned than an adversarial court case. Alternative dispute resolution techniques have evolved as an attractive alternative to formal judicial proceedings. They are a valuable way to access justice -- providing services and remedies and costs which are proportionate to the issues at stake'⁹.

In an attempt to provide a simpler and quicker alternative method for resolving unfair dismissal cases than by application to an employment tribunal¹⁰, the Advisory, Conciliation and Arbitration Service (commonly known as 'ACAS')¹¹ has prepared a scheme providing for arbitration in the case of disputes involving proceedings, or claims which could be the subject of proceedings, before an employment tribunal arising out of a contravention or alleged contravention of the unfair dismissal provisions¹² of the Employment Rights Act 1996¹³.

Statutory adjudication is also provided for under the Housing Grants, Construction and Regeneration Act 1996 in relation to construction contracts¹⁴. A party to a construction contract has the right to refer a dispute arising under the contract to adjudication, and provision must be made in the contract to comply with the statutory requirements as to the adjudication procedure¹⁵. Where the contract does not comply with such requirements, the adjudication provisions of the scheme for construction contracts apply¹⁶.

1 As to how the court should deal with an application for the appointment of an arbitrator where the opposing party contends that there is a valid ADR process in existence see *Holloway v Chancery Mead Ltd* [2007] EWHC 2495 (TCC), [2008] 1 All ER (Comm) 653, 117 ConLR 30.

2 The court has power to direct the umpire in an expert determination to state reasons or further reasons, if the determination does not contain sufficient reasoning to enable the matter to be considered: *Halifax Life Ltd v The Equitable Life Assurance Society* [2007] EWHC 503 (Comm), [2007] 2 All ER (Comm) 672, [2007] 1 Lloyd's Rep 528.

3 CPR 1.1(1). As to the overriding objective see further **CIVIL PROCEDURE** vol 11 (2009) PARA 33 et seq.

4 CPR 1.4(1). As to active case management see **CIVIL PROCEDURE** vol 11 (2009) PARAS 35, 246.

5 CPR 1.4(2)(e). See *Cowl v Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 WLR 803 (courts should ensure parties have explored all alternative means before resorting to litigation). The court may direct alternative dispute resolution notwithstanding the objection of a party to the proceedings, but it cannot order a particular person to attend: *Shirayama Shokusan Co Ltd v Danovo Ltd* [2004] 1 WLR 2985.

As to the procedure for arbitration proceedings see CPR Pt 62; *Practice Direction--Arbitration* PD62; and PARAS 1203, 1275, 1283-1287, 1292-1293, 1307.

6 See *Dunnett v Railtrack plc (in railway administration)* [2002] EWCA Civ 303, [2002] 2 All ER 850, [2002] 1 WLR 2434; *Burchell v Bullard* [2005] EWCA Civ 358, [2005] BLR 330.

7 See the Admiralty and Commercial Courts Guide (6th Edn, 2006) paras G1, G2. As to the Admiralty and Commercial Courts Guide see **CIVIL PROCEDURE** vol 12 (2009) PARA 1536.

As to the Commercial Court's encouragement of ADR see *Practice Note* [1994] 1 All ER 34, sub nom *Practice Statement* [1994] 1 WLR 14; *Practice Note* [1996] 3 All ER 383, sub nom *Practice Statement (No 2)* [1996] 1 WLR 1024; *Practice Direction* (1997) Times, 2 October. See also *Cable and Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm), [2002] 2 All ER (Comm) 1041.

As to Commercial Court judges sitting as arbitrators see PARA 1226 note 20; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1544.

8 Lord Chancellor's Department Press Notice 117/01 *Government Pledges to Settle Legal Disputes out of Court* (23 March 2001).

9 Lord Chancellor's Department Press Notice 117/01 *Government Pledges to Settle Legal Disputes out of Court* (23 March 2001).

10 See the Green Paper *Resolving Employment Rights Disputes: Options for Reform* (Cm 2707) (1994).

11 As to the constitution of ACAS see **EMPLOYMENT** vol 41 (2009) PARA 1182 et seq. See *Flight Training International Inc v International Fire Training Equipment Ltd* [2004] EWHC 721 (Comm), [2004] 2 All ER (Comm) 568 (attempt to refer commercial dispute to ACAS did not constitute valid agreement to arbitrate).

12 See the Employment Rights Act 1996 Pt X (ss 94-134A): see **EMPLOYMENT** vol 40 (2009) PARA 712 et seq.

13 See the Trade Union and Labour Relations (Consolidation) Act 1992 s 212A(1)(a); and the ACAS Arbitration Scheme (Great Britain) Order 2004, SI 2004/753. See further **EMPLOYMENT** vol 40 (2009) PARA 779.

14 See the Housing Grants, Construction and Regeneration Act 1996 Pt II (ss 104-117); and **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS** vol 4(3) (Reissue) PARA 206 et seq.

15 See the Housing Grants, Construction and Regeneration Act 1996 s 108; and **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS** vol 4(3) (Reissue) PARA 207. By starting court proceedings, a claimant does not necessarily waive his right to refer a dispute to adjudication: see *Herschel Engineering Ltd v Breen Property Ltd* [2000] BLR 272, [2000] All ER (D) 559.

16 See **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS** vol 4(3) (Reissue) PARAS 208-213.

UPDATE

1204 Alternative dispute resolution

NOTE 7--See now *The Admiralty and Commercial Courts Guide* (8th Edn, 2009) paras G1, G2.

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(2) APPLICABLE LAWS

1205. Law governing the arbitration.

An arbitration is governed by three areas of law:

- (1) the law governing the substance of the dispute between the parties;
- (2) the law of the arbitration agreement which governs the parties' right to submit disputes to arbitration and their obligation to meet any arbitral award (often referred to as the 'proper law of the arbitration agreement')¹; and
- (3) the procedural law of the arbitration (often referred to as the 'curial law of the arbitration')².

In many cases the law of a single jurisdiction will govern all aspects of the arbitration, although it is common in international arbitrations for the laws of different jurisdictions to apply to different aspects of the arbitration. For example, an arbitration taking place in England may be subject to English procedural law and the arbitration agreement itself may be governed by English law, but the substance of the dispute between the parties may be governed by the law of another country. There may be scope for the three areas of law set out in heads (1) to (3) above to be broken down further³.

1 As to the proper law of the arbitration agreement see PARA 1206.

2 As to the procedural law of the arbitration see PARA 1207.

3 See eg *Sonatrach Petroleum Corp'n v Ferrell International Ltd* [2002] 1 All ER (Comm) 627 (Sonatrach had sub-chartered a vessel from Ferrell who had in turn time-chartered the vessel from Mitsui. The arbitration agreement in the sub-charter provided that disputes between Sonatrach and Ferrell would be resolved by the High Court in London and subject to English law, save that disputes involving Mitsui would be resolved by arbitration in Japan and subject to Japanese law. The court held that the proper law applicable to a particular right or obligation under the charter could not be identified with complete certainty at the time of performance and consequently the choice of law clause was unenforceable. This did not, however, have the effect of invalidating the forum selection regime).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/1. THE LAW OF ARBITRATION/ (2) APPLICABLE LAWS/1206. Proper law of the arbitration agreement.

1206. Proper law of the arbitration agreement.

The proper law of the arbitration agreement governs its validity, interpretation and effect¹. That proper law is determined in accordance with the general principles of the conflict of laws, namely the law chosen by the parties or, in the absence of such choice, the law of the country with which the agreement is most closely connected². An agreement to submit future disputes to arbitration usually forms part of a substantive contract, for example a contract of sale, but is to be treated as a separate contract³. Normally the proper law of the arbitration agreement will be the same as the proper law of the substantive contract of which it forms part, but exceptionally this may not be the case⁴. Once a particular dispute has arisen, its reference by the parties to arbitration gives rise to a further contract separate from the agreement to submit future disputes to arbitration. This separate agreement has its own proper law⁵.

1 *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, [1970] 1 All ER 796, [1970] 1 Lloyd's Rep 269, HL.

2 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 62 et seq. It should be noted that the Convention on the Law Applicable to Contractual Obligations (Rome, 19 June 1980; Cmnd 8489) art 1(2)(d), incorporated into English law by the Contracts (Applicable Law) Act 1990, excludes from its scope arbitration agreements, so their proper law continues to be determined by common law principles: see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 349.

3 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn* [1981] AC 909, [1981] 1 All ER 289, [1981] 1 Lloyd's Rep 253, HL. As to contracts generally see **CONTRACT**.

4 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446.

5 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446 (where the proper law of the contract regulating the individual reference to arbitration had to be ascertained for the purpose of determining whether it had been terminated by frustration or repudiation).

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1207. Procedural law of the arbitration.

The procedural law (often referred to as the 'curial law') governs the arbitration proceedings, namely the conduct of the arbitration and the supervisory powers of the court¹. In the absence of any choice of law, the procedural law will be the law of the jurisdiction which is the seat of the arbitration².

1 *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, [1970] 1 All ER 796, [1970] 1 Lloyd's Rep 269, HL.

2 *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, [1970] 1 All ER 796, [1970] 1 Lloyd's Rep 269, HL; *Bank Mellat v Helliniki Techniki SA* [1984] QB 291, [1983] 3 All ER 428, CA, per Kerr LJ; *C v D* [2007] EWCA Civ 1282, [2008] 1 All ER (Comm) 1001, [2008] 1 Lloyd's Rep 239. The seat of the arbitration is normally stipulated in the arbitration agreement or some subsequent document, but does not imply that all meetings or hearings of the arbitral tribunal need be held in that country: *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116, CA, per Kerr LJ. As to the meaning of 'seat of the arbitration' see PARA 1212.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/1. THE LAW OF ARBITRATION/ (2) APPLICABLE LAWS/1208. Rules applicable to the substance of the dispute.

1208. Rules applicable to the substance of the dispute.

The arbitral tribunal¹ must decide the dispute² in accordance with the law chosen by the parties³ as applicable to the substance of the dispute⁴ or, if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal⁵. For this purpose, the choice of the laws of a country must be understood to refer to the substantive laws of that country and not its conflict of laws rules⁶. If or to the extent that there is no such choice or agreement, the tribunal must apply the law determined by the conflict of laws rules which it considers applicable⁷.

1 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

2 As to the meaning of 'dispute' see PARA 1210 note 3.

3 See further PARA 1211 text to note 6. As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

4 Arbitration Act 1996 s 46(1)(a). See *Wealands (widow and administratrix of the estate of Wealands) v CLC Contractors Ltd* [2000] 1 All ER (Comm) 30 at 40, [1999] 2 Lloyd's Rep 739 at 749, CA, where Mance LJ commented, obiter, that he considered that the Arbitration Act 1996 s 46(1) preserved and conferred the same general jurisdiction, powers and duty as the courts had recognised arbitrators to possess by implication under the previous legislation, including the power to award contribution. See also *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240, [1950] 2 All ER 618, CA; *President of India v La Pintada Cia Navegación SA, La Pintada* [1985] AC 104, [1984] 2 All ER 773, HL (both cases decided under previous legislation).

5 Arbitration Act 1996 s 46(1)(b). As to the application of Pt I (ss 1-84) see PARA 1209. In relation to a statutory arbitration, s 46 applies with the omission of s 46(1)(b): s 96(1), (4). As to statutory arbitrations see PARA 1209 note 7.

In the application of s 46(1)(b) to an arbitration agreement made before 31 January 1997, the agreement has effect in accordance with the rules of law (including any conflict of laws rules) as they stood immediately before that date: Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146, art 4, Sch 2 para 4.

The effect of the Arbitration Act 1996 s 46(1)(b) is to recognise that parties may agree that their dispute should be settled in accordance with general principles of fairness. Such agreements are often referred to as 'equity clauses', arbitration 'ex aequo et bono' or 'amiable composition'. The agreements effectively exclude rights of appeal to the court, because there is no question of law to appeal.

6 Arbitration Act 1996 s 46(2). As to conflict of laws generally see **CONFLICT OF LAWS**.

7 Arbitration Act 1996 s 46(3).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(1) INTRODUCTION/1209. Application of Part I of the Arbitration Act 1996.

2. ARBITRATION UNDER

(1) INTRODUCTION

1209. Application of Part I of the Arbitration Act 1996.

The provisions of Part I of the Arbitration Act 1996¹ apply to arbitral proceedings commenced on or after 31 January 1997 under an arbitration agreement² irrespective of when it was made³ where the seat of the arbitration⁴ is in England, Wales or Northern Ireland⁵.

The provisions of Part I also apply to every arbitration under an enactment⁶ (a 'statutory arbitration'), whether the enactment was passed or made before or after 31 January 1997⁸, subject to certain adaptations and exclusions⁹.

The provisions of Part I do not apply to small claims arbitrations¹⁰ in the county court¹¹.

1 Ie the Arbitration Act 1996 Pt I (ss 1-84).

2 This includes any arbitration agreement to which Her Majesty, either in right of the Crown or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party: Arbitration Act 1996 s 106(1). Where Her Majesty is party to an arbitration agreement otherwise than in right of the Crown, Her Majesty must be represented, for the purposes of any arbitral proceedings (1) where the agreement was entered into by Her Majesty in right of the Duchy of Lancaster, by the Chancellor of the Duchy or such person as he may appoint (s 106(2)(a)); and (2) in any other case, by such person as Her Majesty may appoint in writing under the royal sign

manual (s 106(2)(b)). Where the Duke of Cornwall is party to an arbitration agreement, he must be represented for the purposes of any arbitral proceedings by such person as he may appoint: s 106(3). As to the meaning of 'arbitration agreement' see PARA 1213. As to the meaning of 'party' in relation to an arbitration agreement for the purposes of Pt I see PARA 1210 note 6. As to the Crown see **CROWN AND ROYAL FAMILY** vol 12(1) (Reissue) PARA 1 et seq. As to the Duchy of Lancaster see **CROWN PROPERTY** vol 12(1) (Reissue) PARA 300 et seq. As to the Duke of Cornwall see **CROWN AND ROYAL FAMILY** vol 12(1) (Reissue) PARAS 30-31; **CROWN PROPERTY** vol 12(1) (Reissue) PARA 318 et seq. As to the royal sign manual see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 908, 912.

3 Arbitration Act 1996 s 84(1), (2); Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146, art 3. As to arbitral proceedings commenced before 31 January 1997 see PARA 1203.

4 As to the meaning of 'seat of the arbitration' see PARA 1212.

5 Arbitration Act 1996 s 2(1). Where the seat of the arbitration is outside England, Wales or Northern Ireland or no seat has been designated or determined, ss 9-11 (stay of legal proceedings: see PARAS 1222, 1225), s 66 (enforcement of arbitral awards: see PARA 1274), and the powers conferred by s 43 (securing the attendance of witnesses: see PARA 1253) and s 44 (court powers exercisable in support of arbitral proceedings: see PARA 1254), still apply: s 2(2), (3). The court may, however, refuse to exercise any such power if, in its opinion, the fact that the seat of the arbitration is outside England, Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England, Wales or Northern Ireland, makes it inappropriate to do so: s 2(3). The court may exercise a power conferred by any provision of Pt I which is not mentioned in s 2(2) or s 2(3) for the purpose of supporting the arbitral process where no seat of the arbitration has been designated or determined and, by reason of a connection with England, Wales or Northern Ireland, the court is satisfied that it is appropriate to do so: s 2(4). Where the law applicable to the arbitration agreement is the law of England and Wales or of Northern Ireland, s 7 (separability of the arbitration agreement: see PARA 1214) and s 8 (death of a party: see PARA 1216) apply, even if the seat of the arbitration is outside England, Wales or Northern Ireland or has not been designated or determined: s 2(5).

As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

6 For the purposes of the Arbitration Act 1996 ss 94-98 (see the text and notes 7-9), 'enactment', in England and Wales, includes an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978 and, in Northern Ireland, means a statutory provision within the meaning of the Interpretation Act (Northern Ireland) 1954 s 1(f): Arbitration Act 1996 s 94(3).

7 The provisions of the Arbitration Act 1996 Pt I do not apply to a statutory arbitration if or to the extent that their application is inconsistent with the provisions of the enactment concerned, or with any rules or procedure authorised or recognised by it, or is excluded by any other enactment: s 94(2). The provisions of Pt I apply to a statutory arbitration as if the arbitration were pursuant to an arbitration agreement and as if the enactment were that agreement; and they apply as if the persons by and against whom a claim subject to arbitration in pursuance of the enactment may be or has been made were parties to that agreement: s 95(1). Every statutory arbitration is taken to have its seat in England, Wales or, as the case may be, Northern Ireland: s 95(2). Further specific adaptations are made to ss 30(1), 35, 46 (see PARAS 1208, 1239, 1249) in relation to statutory arbitrations (see s 96(1)), and ss 8, 9(5), 10(2), 12, 71(4) (see PARAS 1216, 1221-1222, 1225, 1280) are excluded from applying in relation to statutory arbitrations (see s 97). The Secretary of State may make provision by regulations for adapting or excluding any provision of Pt I in relation to statutory arbitrations in general or statutory arbitrations of any particular description: s 98(1). The power is exercisable whether the enactment concerned is passed or made before or after the commencement of the Arbitration Act 1996: s 98(2). Such regulations must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 98(3). At the date at which this volume states the law no such regulations had been made.

In any enactment 'Secretary of State' means one of Her Majesty's Principal Secretaries of State: Interpretation Act 1978 s 5, Sch 1. The Office of Secretary of State is a unified office, and in law each Secretary of State is capable of performing the functions of all or any of them. As to the office of Secretary of State generally see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 355.

8 As to the commencement of the Arbitration Act 1996 see PARA 1202 note 4.

9 Arbitration Act 1996 s 94(1). The adaptations and exclusions are specified in ss 95-98: see note 7.

10 Under the County Courts Act 1984 s 64: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 898, 905. It is submitted that small claims arbitrations were never true arbitrations. The term 'small claims arbitrations' has been abandoned in favour of the designation 'small claims track cases': see CPR Pts 26, 27; and **CIVIL PROCEDURE** vol 11 (2009) PARAS 260 et seq, 274 et seq.

11 Arbitration Act 1996 s 92.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(1) INTRODUCTION/1210. Principles of arbitration.

1210. Principles of arbitration.

The provisions of Part I of the Arbitration Act 1996¹ are founded on the following principles and must be construed accordingly²:

- (1) the object of arbitration is to obtain the fair resolution of disputes³ by an impartial tribunal⁴ without unnecessary delay or expense⁵;
- (2) the parties⁶ should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest⁷; and
- (3) in matters governed by the provisions of Part I of the Arbitration Act 1996 the court⁸ should not intervene except as provided by those provisions⁹.

The provisions of Part I of the Arbitration Act 1996 must not be construed as excluding the operation of any rule of law consistent with those provisions, in particular, any rule of law as to¹⁰:

- (a) matters which are not capable of settlement by arbitration¹¹;
- (b) the effect of an oral arbitration agreement¹²; or
- (c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy¹³.

The Arbitration Act 1996 must not be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award¹⁴.

1 As to the application of the Arbitration Act 1996 Pt I (ss 1-84) see PARA 1209.

2 Arbitration Act 1996 s 1. For examples of the court's construing provisions of the Arbitration Act 1996 in accordance with the general principles set out in s 1 (see heads (1)-(3) in the text) see *R Durnell & Sons Ltd v Secretary of State for Trade and Industry* [2001] 1 All ER (Comm) 41, [2001] 1 Lloyd's Rep 275; *Walker v Rome* [1999] 2 All ER (Comm) 961, [2000] 1 Lloyd's Rep 116; and PARAS 1228, 1260, 1274.

3 For the purposes of the Arbitration Act 1996 Pt I, 'dispute' includes any difference: s 82(1). See also *Amec Civil Engineering v Secretary of State for Transport* [2004] EWHC 2339 (TCC), [2004] All ER (D) 443 (Oct) (on appeal [2005] EWCA Civ 291, [2005] 1 WLR 2339, 101 ConLR 26); *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* [2004] EWCA Civ 1757, 99 ConLR 1, [2005] BLR 63; *Ringway Infrastructure Services Ltd v Vauxhall Motors Ltd* [2007] EWHC 2421 (TCC), [2007] All ER (D) 333 (Oct); and see *Halki Shipping Corp v Sopex Oils Ltd* [1998] 2 All ER 23, [1998] 1 WLR 726, CA (while every arbitration agreement falls to be construed on its own terms, the word 'dispute' should be given its ordinary meaning).

4 As to the arbitral tribunal see PARA 1226 et seq. As to the duty of the tribunal to act fairly and impartially see PARA 1243.

5 Arbitration Act 1996 s 1(a).

6 References in the Arbitration Act 1996 Pt I to a party to an arbitration agreement include any person claiming under or through a party to the agreement (s 82(2)); and references in Pt I to a party or the parties to the arbitration agreement or to arbitral proceedings must be construed, where s 106(2) or s 106(3) (see PARA 1209 note 2) applies, as references to the person representing Her Majesty or the Duke of Cornwall (s 106(4)). As to the meaning of 'arbitration agreement' see PARA 1213. As to the Crown see **CROWN AND ROYAL FAMILY** vol

12(1) (Reissue) PARA 1 et seq. As to the Duke of Cornwall see **CROWN AND ROYAL FAMILY** vol 12(1) (Reissue) PARAS 30-31; **CROWN PROPERTY** vol 12(1) (Reissue) PARA 318 et seq.

7 Arbitration Act 1996 s 1(b). It was said during the House of Lords debate on the second reading of the Arbitration Bill (which became the Arbitration Act 1996) that: 'The principle of party autonomy is central to the Bill. The parties who are in dispute are able to decide how the arbitration should be conducted. The flexibility and control which this freedom gives to the parties is of critical importance. Having said that, the freedom is not absolute. There are a small number of provisions which for reasons of public policy cannot be overridden. We thought it right when looking at the current law on arbitration to propose to the House certain changes. These are designed to improve the attractiveness of arbitration to potential users. What they want is a system which is speedy and cost-effective, is final and fair at the same time. We started from the principle that if parties have chosen arbitration rather than the courts to resolve their dispute, this decision must be respected. We propose therefore to curtail the ability of the court to intervene in the arbitral process except where the assistance of the court is clearly necessary to move the arbitration forward or where there has been a manifest injustice. It is thus a deregulatory measure in that we are freeing up the process from unwarranted reference to the courts or unwarranted interference by them': 568 HL Official Report (5th series), 18 January 1996, col 761. As to the principle of party autonomy in the Arbitration Act 1996 Pt 1 see *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] EWHC 727 (TCC), [2006] 4 All ER 79, [2006] 2 All ER (Comm) 81.

8 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

9 Arbitration Act 1996 s 1(c). It has been stated that the use of the word 'should' as opposed to the word 'shall' in s 1(c) showed that an absolute prohibition on intervention by the court in circumstances other than those specified in Pt I was not intended, but that it was clear that the general intention was that the courts should usually not intervene outside the general circumstances specified in Pt I: see *Vale Do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd (t/a Bao Steel Ocean Shipping Co)* [2000] 2 All ER (Comm) 70 at 84, [2000] 2 Lloyd's Rep 1 at 11 per Thomas J. There is no philosophy or ethos of the Arbitration Act 1996 which should deter the court from answering any questions of law raised by an appeal correctly in the event that the arbitrator had erred. Amongst other reasons that is because party autonomy is one of the three general principles upon which Pt I of the Act is founded and, in the instant case, the parties had agreed in the exercise of their autonomy that an appeal should lie to the courts on any question of law: *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] EWHC 727 (TCC), [2006] 4 All ER 79, [2006] 2 All ER (Comm) 81.

10 Arbitration Act 1996 s 81(1).

11 Arbitration Act 1996 s 81(1)(a).

12 Arbitration Act 1996 s 81(1)(b).

13 Arbitration Act 1996 s 81(1)(c). As to arbitral awards see PARA 1257 et seq.

14 Arbitration Act 1996 s 81(2).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(1) INTRODUCTION/1211. Mandatory and non-mandatory provisions.

1211. Mandatory and non-mandatory provisions.

The provisions of Part I of the Arbitration Act 1996¹ regulate the conduct of arbitrations in two ways. First, the Act contains mandatory provisions which have effect notwithstanding any agreement to the contrary². To the extent that the parties have reached an agreement, whether in the arbitration agreement or by a separate agreement, which is inconsistent with one of the mandatory requirements, the relevant provision of the Act takes precedence over the parties' agreement which, in that respect, is unenforceable. Secondly, the Act contains non-mandatory provisions which allow the parties to make their own arrangements by agreement but provide rules which apply in the absence of such agreement³. The parties may make such arrangements by agreeing to the application of institutional rules or providing any other means

by which a matter may be decided⁴. The non-mandatory provisions act as default provisions where matters are not covered by the parties' express agreement.

The scheme of mandatory and non-mandatory provisions in the Act applies irrespective of whether or not the law applicable to the parties' agreement is the law of England and Wales or, as the case may be, Northern Ireland⁵. The choice of a law other than the law of England and Wales or of Northern Ireland as the applicable law in respect of a matter provided for by a non-mandatory provision of Part I of the Act is equivalent to an agreement making provision about that matter⁶.

1 As to the application of the Arbitration Act 1996 Pt I (ss 1-84) see PARA 1209.

2 Arbitration Act 1996 s 4(1). The mandatory provisions of Pt I are ss 9-11 (stay of legal proceedings: see PARAS 1222, 1225), s 12 (power of the court to extend agreed time limits: see PARA 1221), s 13 (application of the Limitation Acts: see PARA 1220), s 24 (power of the court to remove an arbitrator: see PARA 1233), s 26(1) (effect of the death of an arbitrator: see PARA 1234), s 28 (liability of the parties for fees and expenses of arbitrators: see PARA 1236), s 29 (immunity of arbitrators: see PARA 1237), s 31 (objection to substantive jurisdiction of arbitral tribunal: see PARA 1240), s 32 (determination of preliminary point of jurisdiction: see PARA 1241), s 33 (general duty of arbitral tribunal: see PARA 1243), s 37(2) (items to be treated as expenses of arbitrators: see PARA 1247), s 40 (general duty of the parties: see PARA 1244), s 43 (securing the attendance of witnesses: see PARA 1253), s 56 (power to withhold the award in case of non-payment: see PARA 1266), s 60 (effectiveness of agreement for the payment of costs in any event: see PARA 1270), s 66 (enforcement of the award: see PARA 1274), ss 67, 68 (challenging the award: see PARAS 1276-1277), ss 70, 71 (so far as relating to ss 67, 68) (challenge or appeal: see PARAS 1279-1280), s 72 (saving for the rights of a person who takes no part in the proceedings: see PARA 1281), s 73 (loss of right to object: see PARA 1282), s 74 (immunity of arbitral institutions: see PARA 1238), and s 75 (charge to secure the payment of solicitors' costs: see PARA 1254): Sch 1.

3 Arbitration Act 1996 s 4(2).

4 Arbitration Act 1996 s 4(3). See also *C v D* [2007] EWCA Civ 1282, [2008] 1 All ER (Comm) 1001, [2008] 1 Lloyd's Rep 239.

5 See the Arbitration Act 1996 s 4(4).

6 Arbitration Act 1996 s 4(5). For this purpose, an applicable law determined in accordance with the parties' agreement, or which is objectively determined in the absence of any express or implied choice, is to be treated as chosen by the parties: s 4(5).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(1) INTRODUCTION/1212. Seat of the arbitration.

1212. Seat of the arbitration.

For the purposes of Part I of the Arbitration Act 1996¹, the 'seat of the arbitration'² means the juridical seat of the arbitration³ designated by:

- (1) the parties to the arbitration agreement⁴; or
- (2) any arbitral or other institution or person vested by the parties with powers in that regard⁵; or
- (3) the arbitral tribunal⁶ if so authorised by the parties⁷,

or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances⁸.

1 As to the application of the Arbitration Act 1996 Pt I (ss 1-84) see PARA 1209.

2 The concept of the 'seat' of an arbitration was a familiar one in English law before the advent of the Arbitration Act 1996 (see eg *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116, CA; *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 All ER (Comm) 514, [2001] 1 Lloyd's Rep 65), but the Arbitration Act 1996 gave the term a statutory definition (see s 3; and the text to notes 3-8). The seat of the arbitration is intended to refer to a particular state or territory which is associated with a recognisable and distinct system of law: *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 All ER (Comm) 514, [2001] 1 Lloyd's Rep 65.

Once the seat of the arbitration is determined for the purposes of the Arbitration Act 1996 s 3 it cannot be moved unless the parties so agree, or one of the mechanisms set out in s 3 is operated: see *ABB Lummus Global Ltd v Keppel Fels Ltd (formerly Far East Livingston Shipbuilding Ltd)* [1999] 2 Lloyd's Rep 24; *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 All ER (Comm) 514, [2001] 1 Lloyd's Rep 65. These decisions preserve the position which existed before the Arbitration Act 1996. See also *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48.

3 Arbitration Act 1996 s 3.

4 Arbitration Act 1996 s 3(a). As to the meaning of 'arbitration agreement' see PARA 1213. As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

5 Arbitration Act 1996 s 3(b).

6 As to the arbitral tribunal see PARA 1226 et seq.

7 Arbitration Act 1996 s 3(c).

8 Arbitration Act 1996 s 3. In determining what is the seat of the arbitration, the court should take into account the circumstances in existence at the time that the relevant arbitration begins: *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 All ER (Comm) 514, [2001] 1 Lloyd's Rep 65. It has been said that the phrase 'all the relevant circumstances' means that a court has to have regard to any connections with one or more particular countries that can be identified in relation to (1) the parties; (2) the dispute which will be the subject of the arbitration; (3) the proposed procedures in the arbitration, including (if known) the place where hearings are to be held; and (4) the issue of the award or awards: *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 All ER (Comm) 514, [2001] 1 Lloyd's Rep 65. In the absence of some express and clear provision to the contrary, an agreement between the parties that the procedural or curial law of a particular country should apply to the arbitration is likely to have the result that that country is also the seat of the arbitration: see *ABB Lummus Global Ltd v Keppel Fels Ltd (formerly Far East Livingston Shipbuilding Ltd)* [1999] 2 Lloyd's Rep 24. As to the procedural or curial law see PARA 1207.

UPDATE

1212 Seat of the arbitration

NOTE 2--Where there is inconsistency in the agreement between the governing law and the place identified as the seat of arbitration, the former should generally prevail: *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC), [2008] 2 All ER (Comm) 493.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(2) THE ARBITRATION AGREEMENT/1213. Meaning of 'arbitration agreement'.

(2) THE ARBITRATION AGREEMENT

1213. Meaning of 'arbitration agreement'.

For the purposes of Part I of the Arbitration Act 1996¹, 'arbitration agreement' means an agreement to submit to arbitration present or future disputes², whether they are contractual or not³.

The provisions of Part I only apply where the arbitration agreement is in writing⁴, and any other agreement between the parties⁵ as to any matter is effective for the purposes of those provisions only if in writing⁶. There is an agreement in writing if (1) the agreement is made in writing, whether or not it is signed by the parties⁷; (2) the agreement is made by exchange of communications in writing⁸; or (3) the agreement is evidenced in writing⁹. An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement¹⁰. Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing¹¹. An exchange of written submissions in arbitral or legal proceedings¹² in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged¹³.

The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement¹⁴.

It is possible for a party to waive or repudiate an arbitration agreement, as in the case of any contract¹⁵.

1 As to the application of the Arbitration Act 1996 Pt I (ss 1-84) see PARA 1209.

2 As to the meaning of 'dispute' see PARA 1210 note 3. It is not necessary that the arbitration agreement should say in terms that the disputes are to be referred to an 'arbitrator' or to 'arbitration'; what matters is that the agreement should refer disputes to a person other than the court, who is to resolve them in a manner binding on the parties to the agreement: *David Wilson Homes Ltd v Surrey Services Ltd (in liquidation)* [2001] EWCA Civ 34, [2001] 1 All ER (Comm) 449. Thus a clause which provides that a dispute in a contract of insurance is to be referred to a Queen's Counsel to be mutually agreed or, in the event of disagreement, to be appointed by the Chairman of the Bar Council, may be an arbitration agreement: *David Wilson Homes Ltd v Surrey Services Ltd (in liquidation)* [2001] EWCA Civ 34, [2001] 1 All ER (Comm) 449.

An arbitration agreement may be struck down under the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083: see *Zealand and Zealand v Laing Homes Ltd* (2000) 2 TCLR 724 (decided in relation to the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159 (revoked)). As to unfair terms in consumer contracts see **CONTRACT** vol 9(1) (Reissue) PARA 790 et seq.

The court has construed a contract containing an arbitration agreement so as not to give effect to the arbitration agreement, because it was necessary to do so in order to construe the contract consistently with another contract between the same parties which contained a clause conferring exclusive jurisdiction on the English courts; permission to appeal was granted but the appeal was never heard: *MH Alshaya Co WLL v Retek Information Systems Inc* (15 December 2000, unreported).

3 Arbitration Act 1996 s 6(1). As to the requirements for the implication of an agreement to refer a dispute to arbitration see *Gulf Import and Export Co v Bunge SA* [2007] EWHC 2667 (Comm), [2008] 1 Lloyd's Rep 316, [2007] All ER (D) 320 (Nov).

The provisions of the Arbitration Act 1996 Pt I are modified in the case of a domestic arbitration agreement: s 85(1). The modifications are effected by ss 86, 87 (not yet in force): see PARAS 1222, 1255, 1278.

'Domestic arbitration agreement' means an arbitration agreement to which none of the parties is:

(1) an individual who is a national of, or habitually resident in, a state other than the United Kingdom (s 85(2)(a) (not yet in force)); or

(2) a body corporate which is incorporated in, or whose central control and management is exercised in, a state other than the United Kingdom (s 85(2)(b) (not yet in force)),

and under which the seat of the arbitration (if the seat has been designated or determined) is in the United Kingdom (s 85(2) (not yet in force)). As to the meaning of 'United Kingdom' see PARA 1202 note 5. As to the meaning of 'seat of the arbitration' see PARA 1212; definition applied by s 85(3) (not yet in force).

Sections 85-87 are to be brought into force by order made by the Secretary of State under s 109(1) as from a day to be appointed. At the date at which this volume states the law no such day had been appointed. However, there is no real prospect of ss 85-87 being brought into force. In July 1996 the Court of Appeal upheld the decision of Waller J in the Commercial Court, in which it was held (in the context of the Consumer Arbitration Agreements Act 1988) that the distinction between international and domestic arbitration was incompatible with European Community law because it amounted to a restriction on the freedom to provide services contrary to the Treaty Establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) (the 'EC Treaty') art 49 (formerly art 59 and renumbered by virtue of the Treaty of Amsterdam: see *Treaty Citation (No 2) (Note)* [1999] All ER (EC) 646, ECJ) and/or unlawful discrimination contrary to EC Treaty art 12 (formerly art 6 and so renumbered): *Philip Alexander Securities and Futures Ltd v Bamberger* ([1997] ILPr 72) (affd [1997] ILPr 104, CA); Departmental Advisory Committee on Arbitration Law *Supplementary Report on the Arbitration Act 1996* (January 1997) para 48. No distinction is therefore made under the Arbitration Act 1996 between domestic and international arbitrations.

The Secretary of State may by order repeal or amend the provisions of ss 85-87 (not yet in force): s 88(1). Such an order may contain such supplementary, incidental and transitional provisions as appear to the Secretary of State to be appropriate: s 88(2). Such an order must be made by statutory instrument, and may not be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament: s 88(3). At the date at which this volume states the law no such order had been made. As to the Secretary of State see PARA 1209 note 7.

4 References in the Arbitration Act 1996 Pt I to anything being written or in writing include its being recorded by any means: s 5(6). There are savings for any rule of law as to the effect of an oral arbitration agreement: see PARA 1210.

5 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

6 Arbitration Act 1996 s 5(1). The expressions 'agreement', 'agree' and 'agreed' must be construed accordingly: s 5(1).

7 Arbitration Act 1996 s 5(2)(a).

8 Arbitration Act 1996 s 5(2)(b).

9 Arbitration Act 1996 s 5(2)(c).

10 Arbitration Act 1996 s 5(4).

11 Arbitration Act 1996 s 5(3).

12 Although arbitral proceedings may be a form of legal proceedings, for the purposes of the Arbitration Act 1996 Pt I, 'legal proceedings' means civil proceedings in the High Court or a county court: s 82(1). 'High Court' means, in relation to England and Wales, Her Majesty's High Court of Justice in England and, in relation to Northern Ireland, Her Majesty's High Court of Justice in Northern Ireland: Interpretation Act 1978 s 5, Sch 1. See further **COURTS** vol 10 (Reissue) PARA 602 et seq. 'County court' means, in relation to England and Wales, a court held for a district under the County Courts Act 1984 and, in relation to Northern Ireland, a court held for a division under the County Courts (Northern Ireland) Order 1980, SI 1980/397: Interpretation Act 1978 Sch 1 (definition amended by the County Courts Act 1984 s 148(1), Sch 2 para 68; and SI 1980/397). See further **COURTS** vol 10 (Reissue) PARA 701 et seq.

13 Arbitration Act 1996 s 5(5). In its *Report on the Arbitration Bill* (February 1996), the Departmental Advisory Committee on Arbitration Law said, of what is now the Arbitration Act 1996 s 5(5), that it had 'been careful to emphasise that for there to be an effective arbitration agreement for the purpose of this Part, it is not enough for one party to allege in a written submission that there is an arbitration agreement, in circumstances where the other party simply fails to respond at all. If this were enough, an unfair obligation would be placed on any party (including a stranger to the proceedings in question) to take the active step of serving a written submission in order to deny this allegation. Therefore, in order to satisfy this sub-section, there must be a failure to deny an allegation by a party who has submitted a response submission': *Report on the Arbitration Bill* (February 1996) para 38.

14 Arbitration Act 1996 s 6(2). In the absence of special circumstances, general words of incorporation are not to be treated as effective for the purposes of s 6(2): see *Trygg Hansa Insurance Co Ltd v Equitas Ltd* [1998] 2 Lloyd's Rep 439, applying the law as stated in *Excess Insurance Co Ltd v Mander* [1997] 2 Lloyd's Rep 119, [1995] LRLR 358 (decided under previous legislation). See also *Cigna Life Insurance Co of Europe SA NV v Intercaser SA De Seguros y Reaseguros* [2002] 1 All ER (Comm) 235.

15 See eg *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 All ER (Comm) 261, [1999] 1 Lloyd's Rep 784; *Herschel Engineering Ltd v Breen Property Ltd* [2000] BLR 272, [2000] All ER (D) 559; *BEA Hotels NV v Bellway LLC* [2007] EWHC 1363 (Comm), [2007] 2 Lloyd's Rep 493, [2007] All ER (D) 90 (Jun)

(no breach or repudiatory breach of agreement to arbitrate where claims against other parties were pursued in court action).

UPDATE

1213 Meaning of 'arbitration agreement'

NOTE 14--See also *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm), [2010] All ER (D) 99 (Jan).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(2) THE ARBITRATION AGREEMENT/1214. Separability of an arbitration agreement.

1214. Separability of an arbitration agreement.

Unless otherwise agreed by the parties¹, an arbitration agreement² which forms or was intended to form part of another agreement, whether or not in writing³, is not regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective; and for that purpose it is treated as a distinct agreement⁴.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'arbitration agreement' see PARA 1213.

3 As to the meaning of 'writing' see PARA 1213 note 4.

4 Arbitration Act 1996 s 7. This provision applies where the law applicable to the arbitration agreement is the law of England and Wales or of Northern Ireland even if the seat of the arbitration is outside England, Wales or Northern Ireland or has not been designated or determined: see s 2(5); and PARA 1209 note 5. As to the application of Pt I see PARA 1209. As to the meaning of 'seat of the arbitration' see PARA 1212.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(2) THE ARBITRATION AGREEMENT/1215. Construction of an arbitration agreement.

1215. Construction of an arbitration agreement.

Parliament has not attempted to regulate the construction of arbitration agreements by statute¹; they must therefore be construed according to common law principles. However, it has recently been held that 'the time has come to draw a line under the authorities to date and make a fresh start'².

Thus it has now been said that arbitration is consensual, and depends upon the intention of the parties as expressed in their agreement; only from the agreement is it possible to tell what kind of disputes they intended to submit to arbitration³; and the meaning which parties intended to express by the words which they used will be affected by the commercial background⁴. A proper approach to construction therefore requires the court to give effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause⁵.

The construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal⁶; and the clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction⁷.

1 As to contractual terms generally see **CONTRACT** vol 9(1) (Reissue) PARA 767 et seq. The Arbitration Act 1996 ss 89-91 extend the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, in relation to a term which constitutes an agreement to submit to arbitration present or future disputes or differences, whether or not contractual (an 'arbitration agreement'), and whatever the law applicable to the arbitration agreement: Arbitration Act 1996 s 89(1), (2), (3). As to the meaning of 'arbitration agreement' for the purposes of Pt I see PARA 1213. Section 89(1) refers to the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, but these were revoked and replaced by the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083: see **CONTRACT** vol 9(1) (Reissue) PARA 790 et seq. The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, apply where the consumer is a legal person as they apply where the consumer is a natural person: Arbitration Act 1996 s 90. A term which constitutes an arbitration agreement is unfair for the purposes of the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, so far as it relates to a claim for a pecuniary remedy which does not exceed the amount specified by order: Arbitration Act 1996 s 91(1). The amount specified for the purposes of s 91 is £5,000: Unfair Arbitration Agreements (Specified Amount) Order 1999, SI 1999/2167. An order made under the Arbitration Act 1996 s 91 may make different provision for different cases and for different purposes: s 91(2). The power to make such orders is exercisable in relation to England and Wales by the Secretary of State with the concurrence of the Lord Chancellor (s 91(3)), and any such order must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament (s 91(4)). As to the Secretary of State see PARA 1209 note 7. As to the Lord Chancellor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq. The Lord Chancellor's function under s 91(3)(c) is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

2 See *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40 at [12], [2007] 4 All ER 951 at [12], [2007] 1 Lloyd's Rep 254 at [12] per Lord Hoffmann, and at [28] per Lord Hope of Craighead.

Previously, in addition to much case law based on fine verbal distinctions, the following general principles were held to apply:

- (1) words must be understood in their plain, ordinary and popular sense unless they have generally acquired a peculiar sense distinct from the popular sense (see *Robertson v French* (1803) 4 East 130);
- (2) if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense (see *Antaios Compania Naviera SA v Salen Rederierna AB, The Antaios* [1985] AC 191, [1984] 3 All ER 229, HL);
- (3) to the extent that the drafting of a term gives rise to lacunae or lacks clarity, the considerations of the court should not be driven by semantic niceties, but should be guided by the intentions of the parties (see *Mitsui Construction Co Ltd v A-G of Hong Kong* (1986) 33 BLR 1, 10 ConLR 1);
- (4) in ascertaining the intention of the parties the court should seek to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract (see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896, HL); the court is therefore entitled to consider any factual material which would have affected the way in which the language of a document would have been understood by a reasonable man, save for previous negotiations between the parties and declarations of subjective intent (which are excluded for reasons of practical policy) (see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896, HL).

3 See *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40 at [5], [2007] 4 All ER 951 at [5], [2007] 1 Lloyd's Rep 254 at [5] per Lord Hoffmann.

4 See *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40 at [5], [2007] 4 All ER 951 at [5], [2007] 1 Lloyd's Rep 254 at [5] per Lord Hoffmann.

5 See *Fiona Trust and Holding Corpn v Privalov* [2007] UKHL 40 at [8], [2007] 4 All ER 951 at [8], [2007] 1 Lloyd's Rep 254 at [8] per Lord Hoffmann. The Arbitration Act 1996 s 7 (see PARA 1214) is 'obviously intended to enable the courts to give effect to the reasonable commercial expectations of the parties about the questions which they intended to be decided by arbitration . . . but s 7 will not achieve its purpose if the courts adopt an approach to construction which is likely in many cases to defeat those expectations': see at [12] per Lord Hoffmann; and see also at [32] per Lord Hope of Craighead.

6 See *Fiona Trust and Holding Corpn v Privalov* [2007] UKHL 40 at [7] and [13], [2007] 4 All ER 951 at [7] and [13], [2007] 1 Lloyd's Rep 254 at [7] and [13] per Lord Hoffmann; and see also at [28] per Lord Hope of Craighead.

7 See *Fiona Trust and Holding Corpn v Privalov* [2007] UKHL 40 at [13], [2007] 4 All ER 951 at [13], [2007] 1 Lloyd's Rep 254 at [13] per Lord Hoffmann.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(2) THE ARBITRATION AGREEMENT/1216. Death of a party to an arbitration agreement.

1216. Death of a party to an arbitration agreement.

Unless otherwise agreed by the parties¹, an arbitration agreement² is not discharged by the death of a party and may be enforced by or against the personal representatives³ of that party⁴. This does not affect the operation of any enactment⁵ or rule of law by virtue of which a substantive right or obligation is extinguished by death⁶.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'arbitration agreement' see PARA 1213.

3 As to personal representatives generally see **EXECUTORS AND ADMINISTRATORS**.

4 Arbitration Act 1996 s 8(1). Section 8 applies where the law applicable to the arbitration agreement is the law of England and Wales or of Northern Ireland even if the seat of the arbitration is outside England, Wales or Northern Ireland or has not been designated or determined: see s 2(5); and PARA 1209 note 5. As to the meaning of 'seat of the arbitration' see PARA 1212. As to the application of Pt I (ss 1-84) see PARA 1209. Note that s 8 does not apply in relation to a statutory arbitration: see s 97(a); and PARA 1209 note 7.

As to the death of an arbitrator or a person appointing him see s 26; and PARA 1234.

5 For the purposes of the Arbitration Act 1996 Pt I, 'enactment' includes an enactment contained in Northern Ireland legislation: s 82(1).

6 Arbitration Act 1996 s 8(2).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(2) THE ARBITRATION AGREEMENT/1217. Bankruptcy of a party to a contract containing an arbitration agreement.

1217. Bankruptcy of a party to a contract containing an arbitration agreement.

If a party to a contract containing an arbitration clause becomes bankrupt, his bankruptcy does not have any automatic effect on the contract or on the arbitration clause. Under the provisions

of the Insolvency Act 1986, the trustee in bankruptcy has the power to disclaim unprofitable contracts¹.

Where a bankrupt became party to a contract containing an arbitration agreement² before the commencement of his bankruptcy³, if the trustee in bankruptcy adopts the contract, the arbitration agreement is enforceable by or against him in relation to matters arising from or connected with the contract⁴. If the trustee in bankruptcy does not adopt the contract and a matter to which the arbitration agreement applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings, then an application may be made to the court⁵ by either the trustee with the consent of the creditors' committee or by any other party to the agreement; and the court may, if it thinks fit in all the circumstances of the case, order that the matter be referred to arbitration in accordance with the arbitration agreement⁶.

Where a party to an arbitration becomes bankrupt, the court may stay the arbitration proceedings and those proceedings may not be pursued against the bankrupt party without the court's consent⁷.

1 See the Insolvency Act 1986 s 315; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 472-474, 478, 488. As to trustees in bankruptcy generally see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 316 et seq.

2 As to the meaning of 'arbitration agreement' see PARA 1213; definition applied by the Insolvency Act 1986 s 349A(4) (s 349A added by the Arbitration Act 1996 s 107(1), Sch 3 para 46).

The Insolvency Act 1986 s 349A was brought into force on 31 January 1997, except in relation to (1) arbitral proceedings commenced before that date; (2) arbitration applications commenced or made before that date; and (3) arbitration applications commenced or made on or after that date relating to arbitral proceedings commenced before that date: see the Arbitration Act 1996 (Commencement No 1) Order 1996, SI 1996/3146, arts 3, 4, Sch 2 paras 1, 2. See also PARA 1202 note 4.

3 Insolvency Act 1986 s 349A(1) (as added: see note 2). See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 444.

4 Insolvency Act 1986 s 349A(2) (as added: see note 2).

5 'Court' means the court which has jurisdiction in the bankruptcy proceedings: Insolvency Act 1986 s 349A(4) (as added: see note 2). As to bankruptcy courts see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 6-7.

6 Insolvency Act 1986 s 349A(3) (as added: see note 2).

7 See the Insolvency Act 1986 s 285; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 218, 730.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(2) THE ARBITRATION AGREEMENT/1218. Assignment of a contract containing an arbitration clause.

1218. Assignment of a contract containing an arbitration clause.

In cases where the benefit of a contract which contains an arbitration clause has been assigned, the issue of the effect of the assignment on the arbitration clause is often also discussed in terms of assignment. However, generally only the benefit and not the burden of a contract is capable of assignment¹ and an arbitration agreement creates both benefits and burdens. If the law of assignment is applied without qualification then only the benefits of the arbitration agreement are capable of being transferred to the assignee. The courts have recognised the impracticality of this approach².

There is no rule of law that an arbitration clause is always transferred on assignment of the contract. Whether the assignment is effective also to transfer the rights and obligations created by an arbitration agreement depends upon the construction of the arbitration agreement itself. However, in the absence of express words entitling only the original parties to the contract to refer a dispute to arbitration, an assignee of rights under a contract containing an arbitration clause has the right to enforce those rights through arbitration³.

The effect of the Arbitration Act 1996 is that an arbitral award⁴ made pursuant to an arbitration agreement is final and binding both on the parties to that agreement and on any parties claiming through or under them⁵, including assignees.

Where a party to an arbitration agreement has assigned a debt by legal assignment pursuant to the Law of Property Act 1925, he is entitled to go to arbitration as the arbitration agreement cannot be transferred, although he cannot enforce the debt since he has divested himself of the right to claim the debt⁶. The assignee under a legal assignment is entitled to pursue the claim in an arbitration in his name alone⁷. An equitable assignee is required to join the assignor as a party to the arbitration⁸.

1 See **CONTRACT** vol 9(1) (Reissue) PARA 757.

2 Where there is a statutory transfer of rights under the Third Parties (Rights against Insurers) Act 1930 the House of Lords considered that the agreement to arbitrate is one which regulates the means by which the transferred right may be enforced and the whole agreement must therefore be treated as transferred to the transferee as part of, or inseparably connected with the transferred right: *Firma C-Trade SA v Newcastle Protection and Indemnity Association, The Fanti, Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association (London) Ltd (No 2), The Padre Island* [1991] 2 AC 1, [1990] 2 All ER 705, HL.

The same reasoning has been applied in cases of legal assignment: see *Montedipe SpA v JTP-RO Jugotanker, The Jordan Nicolov* [1990] 2 Lloyd's Rep 11 at 15 per Hobhouse J ('the assignee is bound by the arbitration clause in the sense that he cannot assert the assigned right without also accepting the obligation to arbitrate'); *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intetrading GmbH* [1997] 2 Lloyd's Rep 279 at 285, CA, per Hobhouse J ('the assignee takes the assigned right with both the benefit and the burden of the arbitration clause').

3 See *Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association (London) Ltd, The Padre Island* [1984] 2 Lloyd's Rep 408. See also *Freshwater v Western Australian Assurance Co Ltd* [1933] 1 KB 515, (1932) 44 Ll L Rep 282, CA; *Dennehy v Bellamy* [1938] 2 All ER 262, 60 Ll L Rep 269, CA; *Smith v Pearl Assurance Co Ltd* [1939] 1 All ER 95, 63 Ll L Rep 1, CA; *Shayler v Woolf* [1946] Ch 320, [1946] 2 All ER 54, CA. As to third party rights under an arbitration clause where a benefit is conferred upon a third party and there is an obligation to go to arbitration see the Contracts (Rights of Third Parties) Act 1999 s 8; and *Nisshin Shipping v Cleaves* [2003] EWHC 2602 (Comm), [2004] 1 All ER (Comm) 481, [2004] 1 Lloyd's Rep 38.

4 As to arbitral awards see PARA 1257 et seq.

5 See the Arbitration Act 1996 s 58(1); and PARA 1268.

6 See *Cottage Club Estates Ltd v Woodside Estates Co (Amersham) Ltd* [1928] 2 KB 463.

7 *Aspell v Seymour* [1929] WN 152, CA; and see *Montedipe SpA v JTP-RO Jugotanker, The Jordan Nicolov* [1990] 2 Lloyd's Rep 11 (where a party had commenced arbitration proceedings, and then assigned the right it was seeking to enforce, the assignor was no longer entitled to an award, and the assignee was entitled to take the assignor's place in the arbitration). See also *Baytur v Finagro Holding SA* [1992] QB 610, [1991] 4 All ER 129, CA.

8 *Sim Swee Joo Shipping Sdn Bhd v Shirlstar Container Transport Ltd* (17 February 1994, unreported).

UPDATE

1218 Assignment of a contract containing an arbitration clause

NOTES 2, 3--See *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm), [2009] 1 All ER (Comm) 568 (effect of novation of contract containing arbitration clause).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/ (3) COMMENCEMENT OF THE ARBITRATION/1219. Commencement of the arbitral proceedings.

(3) COMMENCEMENT OF THE ARBITRATION

1219. Commencement of the arbitral proceedings.

Parties to an arbitration agreement¹ are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of Part I of the Arbitration Act 1996² and for the purposes of the Limitation Acts³.

If there is no such agreement⁴, then (1) where the arbitrator⁵ is named or designated in the arbitration agreement, arbitral proceedings⁶ are commenced in respect of a matter when one party serves on the other party or parties a notice in writing⁷ requiring him or them to submit that matter to the person so named or designated⁸; (2) where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter⁹; (3) where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter¹⁰.

1 As to the meaning of 'arbitration agreement' see PARA 1213. As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the application of the Arbitration Act 1996 Pt I (ss 1-84) see PARA 1209.

3 Arbitration Act 1996 s 14(1). For the purposes of Pt I, 'Limitation Acts' means, in England and Wales, the Limitation Act 1980, the Foreign Limitation Periods Act 1984 and any other enactment, whenever passed, relating to the limitation of actions and, in Northern Ireland, the Limitation (Northern Ireland) Order 1989, the Foreign Limitation Periods (Northern Ireland) Order 1985 and any other enactment, whenever passed, relating to the limitation of actions: Arbitration Act 1996 s 13(4). See generally **LIMITATION PERIODS**. As to the meaning of 'enactment' see PARA 1216 note 5.

Section 14 should be interpreted broadly and flexibly and a strict and technical approach to s 14 has no place in the scheme of the Arbitration Act 1996: *Seabridge Shipping AB v AC Orsleff's Eff's A/S* [2000] 1 All ER (Comm) 415, [1999] 2 Lloyd's Rep 685.

4 Arbitration Act 1996 s 14(2).

5 For the purposes of the Arbitration Act 1996 Pt I, 'arbitrator', unless the context otherwise requires, includes an umpire: s 82(1).

6 Where an arbitral procedure provides a first tier to be followed by an appeal arbitration, the two tiers are to be regarded as a single arbitration for the purposes of the Arbitration Act 1996 s 14: *Korn-Og Foderstofforretningen Emmelev A/S v Kaz Tejis Jaykant Establishments Pte Ltd* (22 January 1999, unreported).

7 References in the Arbitration Act 1996 Pt I to a notice or other document include any form of communication in writing, and references to giving or serving a notice or other document are to be construed accordingly: s 76(6). As to the meaning of 'writing' see PARA 1213 note 4.

The parties are free to agree on the manner of service of any notice or other document required or authorised to be given or served in pursuance of the arbitration agreement or for the purposes of the arbitral proceedings: s 76(1). If or to the extent that there is no such agreement, a notice or other document may be served on a person by any effective means (s 76(2), (3)); and a notice or other document must be treated as effectively served if it is addressed, pre-paid and delivered to the addressee's last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or where the addressee is a body corporate, to the body's registered or principal office (s 76(2), (4)). Section 76 does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court (see PARA 1285): s 76(5). As to the meaning of 'legal proceedings' see PARA 1213 note 12. As to the meaning of 'rules of court' see PARA 1221 note 7.

Unless otherwise agreed by the parties, the court may make such order as it thinks fit for service in such manner as the court may direct, or dispensing with service of the document (s 77(2)), where service of a document on a person in the manner agreed by the parties, or in accordance with the provisions of s 76 having effect in default of agreement, is not reasonably practicable (s 77(1)). The power of the court under s 77(2) is exercisable by a judge-arbitrator: s 93(6), Sch 2 para 13(1). Any party to the arbitration agreement may apply for an order, but only after exhausting any available arbitral process for resolving the matter: s 77(3). As to the meaning of 'available arbitral process' see PARA 1221 note 8. The permission of the court is required for any appeal from the court's decision: s 77(4). Any appeal from a decision of a judge-arbitrator under s 77 lies to the Court of Appeal with the permission of that court: Sch 2 para 13(2). As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20. 'Court of Appeal' means, in relation to England and Wales, Her Majesty's Court of Appeal in England and, in relation to Northern Ireland, Her Majesty's Court of Appeal in Northern Ireland: Interpretation Act 1978 s 5, Sch 1. See further **COURTS** vol 10 (Reissue) PARA 634 et seq. See *Bernuth Lines Ltd v High Seas Shipping Ltd, The Eastern Navigator* [2005] EWHC 3020 (Comm), [2006] 1 All ER (Comm) 359, [2006] 1 Lloyd's Rep 537 (service to published email address considered effective).

8 Arbitration Act 1996 s 14(3). See *Lafarge Redland Aggregates Ltd (formerly Redland Aggregates Ltd) v Shephard Hill Civil Engineering Ltd* [2001] 1 All ER 34, [2000] 1 WLR 1621, HL (tripartite operation of arbitration procedure).

9 Arbitration Act 1996 s 14(4). A letter sent by fax by one party to an arbitration agreement to a prospective arbitrator and copied to the other party to the arbitration agreement, and which invited that other party to concur in the appointment of the prospective arbitrator, is capable of constituting notice within s 14(4): *Seabridge Shipping AB v AC Orsleff's Eftf's A/S* [2000] 1 All ER (Comm) 415, [1999] 2 Lloyd's Rep 685.

10 Arbitration Act 1996 s 14(5).

UPDATE

1219 Commencement of the arbitral proceedings

NOTE 3--See *Taylor Woodrow Construction v RMD Kwikform Ltd* [2008] EWHC 825 (TCC), [2009] 1 All ER (Comm) 770.

NOTE 9--See *Bulk & Metal Transport (UK) LLP v Voc Bulk Ultra Handymax Pool LLC, The Voc Gallant* [2009] EWHC 288 (Comm), [2009] 2 All ER (Comm) 377 (message that gave explicit notice of an arbitrator being appointed had not prevented earlier communication complying with s 14).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/ (3) COMMENCEMENT OF THE ARBITRATION/1220. Applicability of the Limitation Acts to claims brought in arbitrations.

1220. Applicability of the Limitation Acts to claims brought in arbitrations.

The Limitation Acts¹ apply to arbitral proceedings as they apply to legal proceedings². The court³ may order that, in computing the time prescribed by the Limitation Acts for the commencement of proceedings, including arbitral proceedings⁴, in respect of a dispute⁵ which

was the subject matter of⁶ (1) an award which the court orders to be set aside or declares to be of no effect⁷; or (2) the affected part of an award which the court orders to be set aside in part, or declares to be in part of no effect⁸, the period between the commencement of the arbitration and the date of the order referred to in head (1) or head (2) above is to be excluded⁹. In determining for the purposes of the Limitation Acts when a cause of action accrued, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which an arbitration agreement¹⁰ applies must be disregarded¹¹.

- 1 As to the meaning of 'Limitation Acts' see PARA 1219 note 3. See generally **LIMITATION PERIODS**.
- 2 Arbitration Act 1996 s 13(1). As to the meaning of 'legal proceedings' see PARA 1213 note 12. The provisions of s 13 are mandatory: see PARA 1211. As to the application of Pt I (ss 1-84) see PARA 1209.
- 3 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.
- 4 As to the commencement of arbitral proceedings see PARA 1219.
- 5 As to the meaning of 'dispute' see PARA 1210 note 3.
- 6 Arbitration Act 1996 s 13(2).
- 7 Arbitration Act 1996 s 13(2)(a).
- 8 Arbitration Act 1996 s 13(2)(b).
- 9 Arbitration Act 1996 s 13(2).
- 10 As to the meaning of 'arbitration agreement' see PARA 1213.
- 11 Arbitration Act 1996 s 13(3).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/ (3) COMMENCEMENT OF THE ARBITRATION/1221. Extension of time limits.

1221. Extension of time limits.

Where an arbitration agreement¹ to refer future disputes² to arbitration provides that a claim will be barred, or the claimant's³ right extinguished, unless the claimant takes within a time fixed by the agreement some step to begin arbitral proceedings, or to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be started, the court⁴ may by order extend the time for taking that step⁵. Any party to the arbitration agreement⁶ may apply for such an order, upon notice⁷ to the other parties, but only after a claim has arisen and after exhausting any available arbitral process⁸ for obtaining an extension of time⁹. The court may make an order only if satisfied that¹⁰ (1) the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time¹¹; or (2) the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question¹². The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed by agreement or by a previous order has expired¹³. The permission of the court is required for any appeal from its decision¹⁴. An order for the extension of time does not affect the operation of the Limitation Acts¹⁵.

Unless the parties otherwise agree, the court¹⁶ may by order extend any time limit¹⁷ agreed by them in relation to any matter relating to the arbitral proceedings or specified in any provision of Part I of the Arbitration Act 1996 having effect in default of such agreement¹⁸. An application for an order to extend a time limit may be made by any party to the arbitral proceedings, upon notice to the other parties and to the arbitral tribunal, or by the tribunal, upon notice to the parties¹⁹. The court may not exercise its power to extend a time limit unless it is satisfied that²⁰ (a) any available recourse to the tribunal, or to any arbitral or other institution or person vested by the parties with power in that regard, has first been exhausted²¹; and (b) a substantial injustice would otherwise be done²². The court's power may be exercised whether or not the time has already expired²³. The order for the extension of time may be made on such terms as the court thinks fit²⁴. The permission of the court is required for any appeal from its decision²⁵.

1 As to the meaning of 'arbitration agreement' see PARA 1213.

2 As to the meaning of 'dispute' see PARA 1210 note 3.

3 'Claimant', unless the context otherwise requires, includes a counterclaimant, and related expressions are to be construed accordingly: Arbitration Act 1996 s 82(1).

4 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

5 Arbitration Act 1996 s 12(1). The provisions of s 12 are mandatory (see PARA 1211) and do not apply in relation to a statutory arbitration (see s 97(b); and PARA 1209 note 7). As to the application of Pt I (ss 1-84) see PARA 1209.

6 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

7 References in the Arbitration Act 1996 Pt I to an application, appeal or other step in relation to legal proceedings being taken 'upon notice' to the other parties to the arbitral proceedings, or to the arbitral tribunal, are to such notice of the originating process as is required by rules of court and do not impose any separate requirement: s 80(1). Rules of court must be made requiring such notice to be given as indicated by any provision of Pt I, and as to the manner, form and content of any such notice: s 80(2). Subject to any provision made by rules of court, a requirement to give notice to the tribunal of legal proceedings must be construed, if there is more than one arbitrator, as a requirement to give notice to each of them and, if the tribunal is not fully constituted, as a requirement to give notice to any arbitrator who has been appointed: s 80(3). As to the meaning of 'legal proceedings' see PARA 1213 note 12. As to the meaning of 'notice' see PARA 1219 note 7. As to the meaning of 'arbitrator' see PARA 1219 note 5. As to the arbitral tribunal see PARA 1226 et seq. The provisions of s 80 do not affect the generality of the power to make rules of court: s 80(7). 'Rules of court', in relation to any court, means rules made by the authority having power to make rules or orders regulating the practice and procedure of that court: Interpretation Act 1978 s 5, Sch 1. The power of the authority to make rules of court includes power to make such rules for the purpose of any Act which directs or authorises anything to be done by rules of court: Sch 1. As to rules that have been made relating to notice see PARA 1286; and **CIVIL PROCEDURE**.

8 'Available arbitral process', in relation to any matter, includes any process of appeal to or review by an arbitral or other institution or person vested by the parties with powers in relation to that matter: Arbitration Act 1996 s 82(1).

9 Arbitration Act 1996 s 12(2). Where the claimant applies for an order under s 12, he may include in his arbitration claim form an alternative application for a declaration that such an order is not needed: CPR 62.4(3); and see PARA 1284.

10 Arbitration Act 1996 s 12(3). In its *Report on the Arbitration Bill* (February 1996), the Departmental Advisory Committee on Arbitration Law preserved the jurisdiction of the court to extend time for the commencement of arbitral proceedings, which was formerly embodied in the Arbitration Act 1950 s 27 (repealed), but sought to restrict the circumstances in which that jurisdiction might be exercised. It was anticipated that what is now the Arbitration Act 1996 s 12(3) would 'give the Courts the opportunity to reconsider how to proceed in the light of the philosophy underlying the Bill as a whole, namely that of party autonomy . . . great care must be taken before interfering with the bargain that the parties have made': *Report on the Arbitration Bill* (February 1996) para 72. It has been stated that the Arbitration Act 1996 s 12 constituted 'a clear change in the law and practice relating to the extension of time for commencement of an arbitration beyond that specified in a contractual time-bar provision': *Harbour and General Works Ltd v Environment Agency* [1999] 1 All ER (Comm) 953 at 961, [1999] BLR 143 at 149 per Colman ; quoted with approval in [2000] 1 All ER 50 at 58, [2000] 1 WLR 950 at 959, CA, per Waller LJ.

11 Arbitration Act 1996 s 12(3)(a). 'The approach to the construction of s 12 has . . . to start from the assumption that when the parties agreed the time-bar, they must be taken to have contemplated that if there were any omission to comply with its provisions in not unusual circumstances arising in the ordinary course of business, the claim would be time-barred unless the conduct of the other party made it unjust that it should. In this connection, it would appear quite impossible to characterise a negligent omission to comply with the time-bar, however little delay were involved, as, without more, outside their mutual contemplation . . . The process of identifying and evaluating in the balance the disparity between the prejudice to the claimant on the one hand and the degree of fault on his part on the other will not normally be a relevant exercise in determining whether there were circumstances beyond the reasonable contemplation of the parties': *Harbour and General Works Ltd v Environment Agency* [1999] 1 All ER (Comm) 953 at 961-962, [1999] BLR 143 at 149-150 per Colman J; quoted with approval in [2000] 1 All ER 50 at 58-59, [2000] 1 WLR 950 at 959-960, CA, per Waller LJ. The Arbitration Act 1996 s 12 'is concerned not to allow the court to interfere with a contractual bargain unless the circumstances are such that if they had been drawn to the attention of the parties when they agreed the provision, the parties would at the very least have contemplated that the time-bar might not apply': *Harbour and General Works Ltd v Environment Agency* [2000] 1 All ER 50 at 59, [2000] 1 WLR 950 at 960, CA, per Waller LJ. See also *Vosnoc Ltd v Transglobal Projects Ltd* [1998] 2 All ER 990, [1998] 1 WLR 101; *Cathship SA v Allanasons Ltd, The Catherine Helen* [1998] 3 All ER 714, [1998] 2 Lloyd's Rep 511. See also *Monella v Pizza Express (Restaurants) Ltd* [2003] EWHC 2966 (Ch), [2004] 1 EGLR 43, [2004] 12 EG 172 (change in the law rendering time limit of the essence was within reasonable contemplation of parties to a lease).

12 Arbitration Act 1996 s 12(3)(b). For the court to make an order under s 12(3)(b) there must be found to be conduct which is proved to have led one party to omit to give notice in time; mere silence or failure to alert that party to the need to comply with the time-bar does not render the barring of the claim unjust: see *Harbour and General Works Ltd v Environment Agency* [2000] 1 All ER 50, [2000] 1 WLR 950, CA. See also *Thyssen Inc v Calypso Shipping Corp SA* [2000] 2 All ER (Comm) 97, [2000] 2 Lloyd's Rep 243.

Where a dispute as to whether an arbitration agreement is time-barred involves substantial contractual issues and one party insists on the issues being resolved in arbitration under the Arbitration Act 1996 s 9 (see PARA 1222), then the matter should be referred to arbitration under the agreement, rather than being dealt with by the court under s 12: *Grimaldi Compagnia di Navigazione SpA v Sekihyo Line Ltd, The Seki Rolette* [1998] 3 All ER 943, [1999] 1 WLR 708.

13 Arbitration Act 1996 s 12(4).

14 Arbitration Act 1996 s 12(6).

15 Arbitration Act 1996 s 12(5). As to the meaning of 'Limitation Acts' see PARA 1219 note 3. As to the applicability of the Limitation Acts to claims brought in arbitrations see PARA 1220.

16 The power conferred by the Arbitration Act 1996 s 79 is exercisable by a judge-arbitrator: s 93(6), Sch 2 para 14(1). See note 4.

17 The parties are free to agree on the method of reckoning periods of time for the purposes of any provision agreed by them or any provision of the Arbitration Act 1996 Pt I having effect in default of such agreement: s 78(1). If or to the extent there is no such agreement:

(1) where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date (s 78(2), (3));

(2) where the act is required to be done a specified number of clear days after a specified date, at least that number of days must intervene between the day on which the act is done and that date (s 78(2), (4)); and

(3) where the period is a period of seven days or less which would include a Saturday, Sunday or a public holiday in the place where anything which has to be done within the period falls to be done, that day must be excluded (s 78(2), (5)).

'Public holiday' means Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 (see **TIME** vol 97 (2010) PARA 321) is a bank holiday: Arbitration Act 1996 s 78(5).

18 Arbitration Act 1996 s 79(1). Section 79 does not apply to a time limit to which s 12 applies (see the text and notes 1-15): see s 79(1). The court has no jurisdiction under s 79(1) to extend the 28-day time limit for bringing an application or appeal against an award under s 70(3) (see PARA 1279), because it is neither a time limit agreed by the parties nor a time limit specified in Pt I as having effect in default of such agreement; however, the court has jurisdiction to extend time pursuant to s 80(5) and the rules of court (see PARA 1279): see the Departmental Advisory Committee on Arbitration Law *Report on the Arbitration Bill* (February 1996) PARA 382; the Departmental Advisory Committee on Arbitration Law *Supplementary Report on the Arbitration Act*

1996 (January 1997) para 41; and *Ranko Group v Antarctic Maritime SA, The Robin* (12 June 1998, unreported); *RC Pillar & Sons v Edwards* [2001] All ER (D) 232 (May). See further PARA 1279 note 6.

19 Arbitration Act 1996 s 79(2).

20 Arbitration Act 1996 s 79(3).

21 Arbitration Act 1996 s 79(3)(a).

22 Arbitration Act 1996 s 79(3)(b).

23 Arbitration Act 1996 s 79(4).

24 Arbitration Act 1996 s 79(5).

25 Arbitration Act 1996 s 79(6). An appeal from a decision of a judge-arbitrator lies to the Court of Appeal with the permission of that court: Sch 2 para 14(2). As to the meaning of 'Court of Appeal' see PARA 1219 note 7.

UPDATE

1221 Extension of time limits

NOTE 18--See *Broda Agro Trade (Cyprus) v Alfred C. Toepfer International* [2009] EWHC 3318 (Comm), [2010] 1 All ER (Comm) 1052.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/ (3) COMMENCEMENT OF THE ARBITRATION/1222. Statutory obligation to stay legal proceedings.

1222. Statutory obligation to stay legal proceedings.

A party to an arbitration agreement¹ against whom legal proceedings² are brought, whether by way of claim or counterclaim, in respect of a matter which under the agreement is to be referred to arbitration may, upon notice³ to the other parties to the proceedings, apply⁴ to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter⁵. An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures⁶. An application may not be made by a person before taking the appropriate procedural step, if any, to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim⁷. On such an application the court must grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed⁸. If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings⁹. These provisions are not applicable where the matter at issue is the existence or scope of an arbitration clause¹⁰; in these circumstances the court has an inherent jurisdiction to stay, although that jurisdiction will not generally be exercised and the court will hear and determine the preliminary issue itself¹¹.

Where Admiralty proceedings¹² are stayed on the ground that the dispute in question should be submitted to arbitration, the court granting the stay has express powers to make orders in relation to security¹³.

1 As to the meaning of 'arbitration agreement' see PARA 1213. As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'legal proceedings' see PARA 1213 note 12.

3 As to the meaning of 'upon notice' see PARA 1221 note 7.

4 Application must be made to the court in which the legal proceedings are pending: see the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215; and PARA 1251. An application under the Arbitration Act 1996 s 9 to stay legal proceedings must be made by application notice to the court dealing with those proceedings: CPR 62.3(3); and see PARA 1284. As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

Such an application notice must be served on all parties to those proceedings who have given an address for service: see CPR 62.8(1). A copy of such an application notice must be served on any other party to the legal proceedings (whether or not he is within the jurisdiction) who has not given an address for service, at his last known address, or a place where it is likely to come to his attention: CPR 62.8(2). Where a question arises as to whether an arbitration agreement has been concluded, or the dispute which is the subject-matter of the proceedings falls within the terms of such an agreement, the court may decide that question or give directions to enable it to be decided and may order the proceedings to be stayed pending its decision: CPR 62.8(3).

5 Arbitration Act 1996 s 9(1). See the text and note 10. See also *Fiona Trust and Holding Corp'n v Privalov* [2007] UKHL 40, [2007] 4 All ER 951, [2007] 1 Lloyd's Rep 254. The provisions of the Arbitration Act 1996 s 9 are mandatory (see PARA 1211) and apply even if the seat of the arbitration is outside England, Wales or Northern Ireland or no seat has been designated or determined (see s 2(2); and PARA 1209 note 5). As to the application of Pt I (ss 1-84) see PARA 1209. As to the meaning of 'seat of the arbitration' see PARA 1212.

Where a defendant in court proceedings joins a third party and there is in existence an arbitration agreement governing the dispute between the defendant and the third party, the court will grant a stay under s 9: *Wealands (widow and administratrix of the estate of Wealands) v CLC Contractors Ltd* [2000] 1 All ER (Comm) 30, [1999] 2 Lloyd's Rep 739, CA. The court has power under its inherent jurisdiction (see PARA 1223) to stay an action arising from an agreement not only where the agreement contains an arbitration clause but also where it contains a clause providing for some alternative form of dispute resolution, such as determination by an expert: *Cott UK Ltd v FE Barber Ltd* [1997] 3 All ER 540. The Supreme Court Act 1981 s 18 does not exclude a right of appeal from a decision of the High Court made under the Arbitration Act 1996 s 9: *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109, [2000] 1 WLR 586, HL. As from a day to be appointed, the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(1) (to be brought into force by an order under s 148(1)). At the date at which this volume states the law, no such day had been appointed.

Where a dispute as to whether an arbitration agreement was time-barred involved substantial contractual issues and one party insisted on the issues being resolved in arbitration under the Arbitration Act 1996 s 9, then the matter should be referred to arbitration under the agreement, rather than being dealt with by the court under s 12 (see PARA 1221): *Grimaldi Compagnia di Navigazione SpA v Sekiyo Line Ltd, The Seki Rolette* [1998] 3 All ER 943, [1999] 1 WLR 708.

See *MH Alshaya Co WLL v Retek Information Systems Inc* (15 December 2000, unreported) (the court was persuaded not to grant a stay under the Arbitration Act 1996 s 9 where there were two agreements which were required to be construed together, one conferring exclusive jurisdiction upon the English courts, the other containing an arbitration clause; permission to appeal was granted but the appeal was never heard).

A claimant may avoid a stay under s 9 by persuading the court to strike down the arbitration agreement under the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083: see *Zealand and Zealand v Laing Homes Ltd* (2000) 2 TCLR 724 (decided in relation to the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159 (revoked)). See also *Heifer International Inc v Christiansen* [2007] EWHC 3015 (TCC), [2008] All ER (D) 120 (Jan). As to unfair terms in consumer contracts see **CONTRACT** vol 9(1) (Reissue) PARA 790 et seq.

See also *A v B* [2006] EWHC 2006 (Comm), [2007] 1 All ER (Comm) 591, [2007] 1 Lloyd's Rep 237; and *McConnell Dowell Constructors (Aust) Pty Ltd v National Grid Gas plc* [2006] EWHC 2551 (TCC), [2007] BLR 92.

6 Arbitration Act 1996 s 9(2).

7 Arbitration Act 1996 s 9(3). An application by a defendant for a default judgment to be set aside and for permission to defend and counterclaim does not amount to taking a step in the proceedings to answer the substantive claim and does not preclude an application for a stay: *Patel v Patel* [2000] QB 551, [1999] 1 All ER (Comm) 923, CA. Where a defendant makes an application for a stay under the Arbitration Act 1996 s 9 and then makes an application for summary judgment to be proceeded with only if the application for a stay is unsuccessful, he has not taken an unequivocal step in the proceedings: *Capital Trust Investments Ltd v Radio Design TJ AB* [2002] EWCA Civ 135, [2002] 2 All ER 159, [2002] 1 All ER (Comm) 514. As to the situation where the particulars of claim are amended after a party has taken steps to address the substantive claim see *Ahad v Uddin* [2005] EWCA Civ 883, (2005) Times, 30 June.

8 Arbitration Act 1996 s 9(4). See note 5. Where there is an arbitration agreement, a claim made by one of the parties, which the other party refuses to admit, is a dispute which must be referred to arbitration, even though the other party does not have a sustainable defence to it: *Halki Shipping Corp v Sopex Oils Ltd* [1998] 2 All ER 23, [1998] 1 WLR 726, CA; and see PARA 1210 note 3. As to the effect of the repudiation of a contract on an arbitration agreement see *Downing v Al Tameer Establishment* [2002] EWCA Civ 721, [2002] 2 All ER (Comm) 545, [2002] BLR 323.

As from a day to be appointed, the Arbitration Act 1996 s 9(4) does not apply to domestic arbitration agreements: see s 86(1) (not yet in force); and PARA 1213 note 3. At the date at which this volume states the law no day had been appointed for the commencement of s 86. As to the meaning of 'domestic arbitration agreement' see PARA 1213 note 3. As from a day to be appointed, on an application for the stay of legal proceedings under s 9 in relation to a domestic arbitration agreement the court must grant a stay unless satisfied that (1) the arbitration agreement is null and void, inoperative, or incapable of being performed (s 86(2)(a) (not yet in force)); or (2) there are other sufficient grounds for not requiring the parties to abide by the arbitration agreement (s 86(2)(b) (not yet in force)). The court may treat as a sufficient ground under head (2) the fact that the applicant is or was at any material time not ready and willing to do all things necessary for the proper conduct of the arbitration or of any other dispute resolution procedures required to be exhausted before resorting to arbitration: s 86(3) (not yet in force). For the purposes of s 86 (not yet in force), the question whether an arbitration agreement is a domestic arbitration agreement must be determined by reference to the facts at the time the legal proceedings are commenced: s 86(4) (not yet in force). As to the power of the Secretary of State to amend the provisions of s 86 (not yet in force) see PARA 1213 note 3. As to the Secretary of State see PARA 1209 note 7. As to the abandonment of the distinction between domestic and international arbitration agreements see PARA 1213 note 3. Although the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted; a dispute may arise before negotiation has concluded, since negotiation is more likely to be consistent with the existence of a dispute than the absence of one: *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* [2004] EWCA Civ 1757, [2005] BLR 63. Where the parties have freely and voluntarily entered into an arbitration agreement they are taken to have waived their right under the European Convention on Human Rights art 6 (as set out in the Human Rights Act 1998 Sch 6 Pt 1) to a public hearing before a court and therefore proceedings will be stayed: *Stretford v Football Association Ltd* [2007] EWCA Civ 238, [2007] 2 All ER (Comm) 1, [2007] 2 Lloyd's Rep 31.

9 Arbitration Act 1996 s 9(5). Section 9(5) does not apply in relation to a statutory arbitration: see s 97(c); and PARA 1209 note 7.

10 See *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd (No 3)* [2007] EWHC 665 (Ch), [2007] 2 All ER 1075, [2007] 2 Lloyd's Rep 1; *El Nasharty v J Sainsbury plc (No 2)* [2007] EWHC 2618 (Comm). See also *Birse Construction Ltd v St David Ltd* [1999] BLR 194 at 196-197 per Judge Humphrey Lloyd QC (decision reversed on other grounds [2000] BLR 57, 70 ConLR 10, CA); quoted with approval in *Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522 at 524-525, [2000] BLR 150 at 152-153, CA, per Waller LJ.

11 As to the inherent jurisdiction to stay see PARA 1223.

12 As to admiralty proceedings see **SHIPPING AND MARITIME LAW**.

13 See the Arbitration Act 1996 s 11(1). Where in such proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest, the court granting the stay may order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute, or order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award: see s 11(1). As to the meaning of 'dispute' see PARA 1210 note 3. Subject to any provision made by rules of court and to any necessary modifications, the same law and practice applies in relation to property retained in pursuance of such an order as would apply if it were held for the purposes of proceedings in the court making the order: s 11(2). As to the meaning of 'rules of court' see PARA 1221 note 7. The provisions of s 11 are mandatory (see PARA 1211) and apply even if the seat of the arbitration is outside England, Wales or Northern Ireland or no seat has been designated or determined (see s 2(2); and PARA 1209 note 5).

UPDATE

1222 Statutory obligation to stay legal proceedings

NOTES 1, 8--A stay will not be granted where the arbitration agreement in question derives from a bilateral international treaty to which the person is not party: *City of London v Sancheti* [2008] EWCA Civ 1283, [2009] 1 Lloyd's Rep 117, [2008] All ER (D) 204 (Nov).

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/ (3) COMMENCEMENT OF THE ARBITRATION/1223. Inherent jurisdiction to stay proceedings.

1223. Inherent jurisdiction to stay proceedings.

The court has always had the power to stay proceedings in favour of arbitration under its inherent jurisdiction to control proceedings. To a large extent that jurisdiction has been overtaken by the statutory jurisdiction now conferred to stay legal proceedings¹. However, there is still scope for the exercise of the inherent jurisdiction. In cases where an arbitration agreement does not satisfy the requirements of the Arbitration Act 1996², and the statutory jurisdiction to stay the proceedings therefore does not apply, the court may nonetheless stay the proceedings in favour of arbitration by invoking its inherent jurisdiction³. The inherent jurisdiction to stay proceedings may be exercised where there are issues as to the existence or construction of an arbitration clause⁴, although the court will generally hear and determine these preliminary issues itself.

1 le under the Arbitration Act 1996 s 9: see PARA 1222.

2 See PARA 1213 et seq.

3 See *JT Mackley & Co Ltd v Gosport Marina Ltd* [2002] EWHC 1315 (TCC), [2002] BLR 367, [2002] All ER (D) 39 (Jul) (the court exercised its inherent jurisdiction to make a declaration as to the validity of a notice of arbitration, notwithstanding that the preconditions to the exercise of its statutory jurisdiction had not been fulfilled); and *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd (No 3)* [2007] EWHC 665 (Ch), [2007] 2 All ER 1075, [2007] 2 Lloyd's Rep 1 (the language of the Arbitration Act 1996 s 9(1) plainly establishes two threshold requirements: first that there has been concluded an arbitration agreement and second that the issue in the proceedings is a matter which under the arbitration agreement is to be referred to arbitration; and unless and until the court is satisfied that both these conditions are satisfied the court cannot grant a stay under s 9, but a stay may be ordered under the court's inherent jurisdiction in exceptional circumstances). See also *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, [1993] 1 All ER 664, HL; *Roussel-Uclaf v GD Searle & Co Ltd* [1978] 1 Lloyd's Rep 225, [1978] RPC 747; *Etri Fans Ltd v NMB (UK) Ltd* [1987] 2 All ER 763, [1987] 1 WLR 1110, CA (cases which were decided under previous legislation).

4 These issues are outside the Arbitration Act 1996 s 9: see PARA 1222.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/ (3) COMMENCEMENT OF THE ARBITRATION/1224. Anti-suit injunctions.

1224. Anti-suit injunctions.

An English court has jurisdiction, which is to be exercised with great caution, to grant an anti-suit injunction restraining a person over whom it has jurisdiction from continuing with or commencing proceedings in a foreign court if it is inequitable for such person so to act¹. The injunction is directed to the respondent and not to the judge in the foreign court². The broad principle underlying the jurisdiction to grant an anti-suit injunction is that it is to be exercised when the ends of justice require it. This may occur when the foreign proceedings are vexatious

or oppressive; or where the institution of the foreign proceedings is a breach of a binding contract³. The contract in question may be an arbitration agreement. Thus, in the context of arbitration, where contracting parties agree to refer disputes to arbitration and a claim falling within the scope of the arbitration agreement is made in proceedings in a foreign court, the English court will ordinarily exercise its discretion to restrain the prosecution of those proceedings in the non-contractual forum, unless the party suing in that forum (the burden being on him) can show strong reasons for proceeding there⁴. Such injunctions have been granted under the Supreme Court Act 1981⁵, but may now also be granted under the Arbitration Act 1996⁶.

1 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 137. However, there may not be jurisdiction to grant an anti-suit injunction where a court within the European Community or the European Free Trade Association is first seised of the proceedings: this question is outstanding pending the appeal to the European Court of Justice in *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA, The Front Comor* [2007] UKHL 4, [2007] 1 All ER (Comm) 794n, [2007] 1 Lloyd's Rep 391.

As to costs, and the general trend towards awarding indemnity costs, see *National Westminster Bank plc v Rabobank Nederland (No 3)* [2007] EWHC 1742 (Comm), [2008] 1 All ER (Comm) 266, [2008] 1 Lloyd's Rep 16.

2 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 137.

3 *Law Debenture Trust Corp plc v Concord Trust* [2007] EWHC 2255 (Ch), [2007] All ER (D) 177 (Oct). For a summary of the principles see *Glencore International AG v Exter Shipping Ltd* [2002] EWCA Civ 528, [2002] 2 All ER (Comm) 1; *Royal Bank of Canada v Coöperative Centrale Raiffeisen-Boerenleenbank BA* [2004] EWCA Civ 07, [2004] 2 All ER (Comm) 847 [2004] 1 Lloyd's Rep 471. See also *Albon (t/a N A Carriage Co) v Naza Motor Trading Sdn Bhd (No 4)* [2007] EWCA Civ 1124, [2008] 1 All ER (Comm) 351. See further *C v D* [2007] EWCA Civ 1282, [2007] All ER (D) 61 (Dec).

4 *Aggeliki Charis Compania Maritima SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's Rep 87, CA; *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA, The Front Comor* [2007] UKHL 4, [2007] 1 All ER (Comm) 794n, [2007] 1 Lloyd's Rep 391; *Starlight Shipping Co v Ta Ping Insurance Co Ltd, The Alexandros T* [2007] EWHC 1893 (Comm), [2008] 1 All ER (Comm) 593, [2008] 1 Lloyd's Rep 230. See also *AWB Geneva SA v North America Steamships Ltd* [2007] EWHC 1167 (Comm), [2007] All ER (D) 303 (May) (interim anti-suit injunction refused).

5 It is under the Supreme Court Act 1981 s 37. As from a day to be appointed, the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(1) (to be brought into force by an order under s 148(1)). At the date at which this volume states the law, no such day had been appointed. See eg *Elektrim SA v Vivendi Universal SA (No 2)* [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep 8; *Through Transport Mutual Insurance v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67.

6 It is under the Arbitration Act 1996 s 44: see PARA 1254. By s 44(1), (2)(e), the court has power to grant an interim injunction for the purposes of and in relation to arbitral proceedings, and under s 44(3), if the case is one of urgency, the court may make an order for the purpose of preserving evidence or assets. This has been held to include the preservation of a contractual right, as a chose or thing in action (*Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 2 All ER (Comm) 203, [2005] 2 Lloyd's Rep 494), including the contractual right to have disputes referred to arbitration (*Starlight Shipping Co v Ta Ping Insurance Co Ltd, The Alexandros T* [2007] EWHC 1893 (Comm), [2008] 1 All ER (Comm) 593, [2008] 1 Lloyd's Rep 230). The discretionary factors which apply are the same as under the Supreme Court Act 1981 s 37 (see note 4): *Starlight Shipping Co v Ta Ping Insurance Co Ltd, The Alexandros T* [2007] EWHC 1893 (Comm), [2008] All ER (Comm) 593, [2008] 1 Lloyd's Rep 230. See also *C v D* [2007] EWHC 1541 (Comm), [2007] 2 All ER (Comm) 557, [2007] 2 Lloyd's Rep 367.

UPDATE

1224 Anti-suit injunctions

NOTE 4--See also *Sheffield United Football Club Ltd v West Ham United Football Club plc* [2008] EWHC 2855 (Comm), [2009] 1 Lloyd's Rep 167, [2008] All ER (D) 293 (Nov).

NOTE 5--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/ (3) COMMENCEMENT OF THE ARBITRATION/1225. Interpleader.

1225. Interpleader.

Where in legal proceedings¹ relief by way of interpleader² is granted and any issue between the claimants³ is one in respect of which there is an arbitration agreement⁴ between them, the court⁵ granting the relief must direct that the issue be determined in accordance with the agreement unless the circumstances are such that proceedings brought by a claimant in respect of the matter would not be stayed⁶.

Where this applies but the court does not direct that the issue be determined in accordance with the arbitration agreement, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter will not affect the determination of that issue by the court⁷.

1 As to interpleader generally see **CIVIL PROCEDURE** vol 12 (2009) PARA 1585 et seq.

2 As to the meaning of 'legal proceedings' see PARA 1213 note 12.

3 As to the meaning of 'claimant' see PARA 1221 note 3.

4 As to the meaning of 'arbitration agreement' see PARA 1213.

5 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

6 Arbitration Act 1996 s 10(1). As to the jurisdiction to grant a stay see PARAS 1222-1223.

The provisions of s 10 are mandatory (see PARA 1211) and apply even if the seat of the arbitration is outside England, Wales or Northern Ireland or no seat has been designated or determined (see s 2(2); and PARA 1209 note 5). As to the application of Pt I (ss 1-84) see PARA 1209. As to the meaning of 'seat of the arbitration' see PARA 1212.

7 Arbitration Act 1996 s 10(2). Section 10(2) does not apply in relation to a statutory arbitration: see s 97(c); and PARA 1209 note 7.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(4) THE ARBITRAL TRIBUNAL/(i) Appointment and Composition/1226. Composition of the arbitral tribunal and procedure for the appointment of arbitrators.

(4) THE ARBITRAL TRIBUNAL

(i) Appointment and Composition

1226. Composition of the arbitral tribunal and procedure for the appointment of arbitrators.

The parties¹ are free to agree on the number of arbitrators² to form the arbitral tribunal and whether there is to be a chairman or umpire³. Unless otherwise agreed by the parties, an agreement that the number of arbitrators will be two or any other even number will be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal⁴. If there is no agreement as to the number of arbitrators, the tribunal consists of a sole arbitrator⁵.

The parties are free to agree on the procedure for appointing the arbitrator or arbitrators, including the procedure for appointing any chairman or umpire⁶. If or to the extent that there is no such agreement⁷, then:

- (1) if the tribunal is to consist of a sole arbitrator, the parties must jointly appoint the arbitrator not later than 28 days after service of a request in writing⁸ by either party to do so⁹;
- (2) if the tribunal is to consist of two arbitrators, each party must appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so¹⁰;
- (3) if the tribunal is to consist of three arbitrators, each party must appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and the two so appointed must forthwith appoint a third arbitrator as the chairman of the tribunal¹¹;
- (4) if the tribunal is to consist of two arbitrators and an umpire, each party must appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and the two so appointed may appoint an umpire at any time after they themselves are appointed and must do so before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration¹²;
- (5) in any other case (in particular, if there are more than two parties) the provisions relating to the failure of the appointment procedure¹³ apply¹⁴.

In deciding whether to exercise, and in considering how to exercise, any of its powers relating to the appointment of arbitrators¹⁵, the court¹⁶ must have due regard to any agreement of the parties as to the qualifications required of the arbitrators¹⁷.

Special provision is made for the appointment of judges of the Commercial Court¹⁸ or the Technology and Construction Court¹⁹ as arbitrators²⁰.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'arbitrator' see PARA 1219 note 5.

3 Arbitration Act 1996 s 15(1). As to the application of Pt I (ss 1-84) see PARA 1209. As to the functions of a chairman see PARA 1229; and as to the functions of an umpire see PARA 1230.

4 Arbitration Act 1996 s 15(2).

5 Arbitration Act 1996 s 15(3).

6 Arbitration Act 1996 s 16(1). As to the immunity of the appointees of arbitrators see PARA 1238.

Unless otherwise specified, there is no time limit on the appointment of an arbitrator: *Indescon Ltd v Ogden* [2004] EWHC 2326 (QB), [2005] 1 Lloyd's Rep 31, [2005] BLR 152.

Where the Arbitration Act 1996 s 16 has to be resorted to, the parties' agreement on the procedure for the original appointment of arbitrators should be applied as far as possible in relation to the filling of a vacancy of an arbitrator, and some degree of manipulation of the appointment procedure is likely to be necessary: *Federal Insurance Co v Transamerica Occidental Life Insurance Co* [1999] 2 All ER (Comm) 138, [1999] 2 Lloyd's Rep 286 (vacancy of arbitrator created when the appointed arbitrator resigned).

- 7 Arbitration Act 1996 s 16(2).
- 8 As to the meaning of 'writing' see PARA 1213 note 4.
- 9 Arbitration Act 1996 s 16(3). As to the reckoning of periods of time see PARA 1221 note 17. As to the power of the court to extend time limits see PARA 1221.
- 10 Arbitration Act 1996 s 16(4).
- 11 Arbitration Act 1996 s 16(5).
- 12 Arbitration Act 1996 s 16(6).
- 13 In the Arbitration Act 1996 s 18: see PARA 1228.
- 14 See the Arbitration Act 1996 s 16(7).
- 15 In under the Arbitration Act 1996 s 16: see the text and notes 6-14.
- 16 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251.
- 17 Arbitration Act 1996 s 19.
- 18 As to the Commercial Court see **COURTS** vol 10 (Reissue) PARA 615.
- 19 The Arbitration Act 1996 s 93 refers to an 'official referee', meaning a person nominated under the Supreme Court Act 1981 s 68(1)(a) to deal with official referees' business: see the Arbitration Act 1996 s 93(5) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(2) (Sch 11 para 1(2) prospectively repealed by the Legal Services Act 2007, s 210, Sch 23), to refer to the Senior Courts Act 1981; at the date at which this volume states the law, no day had been appointed for the amendment or the repeal). The official referees' court has been renamed the Technology and Construction Court: see **COURTS** vol 10 (Reissue) PARA 616.
- 20 A judge of the Commercial Court or the Technology and Construction Court may, in all the circumstances he thinks fit, accept appointment as sole arbitrator or as umpire by or by virtue of an arbitration agreement: Arbitration Act 1996 s 93(1). As to the meaning of 'arbitration agreement' see PARA 1213; definition applied by s 93(5). A judge of the Commercial Court must not do so unless the Lord Chief Justice has informed him that, having regard to the state of business in the High Court and the Crown Court, he can be made available: s 93(2). Likewise, a judge of the Technology and Construction Court must not do so unless the Lord Chief Justice has informed him that, having regard to the state of official referees' business, he can be made available: s 93(3). A judge of the Commercial Court or the Technology and Construction Court appointed as arbitrator or umpire under s 93 is known as a 'judge-arbitrator': s 93(6), Sch 2 para 1. The fees payable for the services of a judge-arbitrator must be taken in the High Court: s 93(4). The provisions of Pt I apply to arbitration before a judge-arbitrator with the modifications set out in Sch 2: s 93(6); and see PARAS 1219, 1221, 1236, 1241, 1251-1254, 1261, 1266, 1272, 1274.
- As to the meaning of 'High Court' see PARA 1213 note 12. 'Crown Court' means, in relation to England and Wales, the Crown Court constituted by the Courts Act 1971 s 4 (now repealed) and, in relation to Northern Ireland, the Crown Court constituted by the Judicature (Northern Ireland) Act 1978 s 4: Interpretation Act 1978 s 5, Sch 1. See further **COURTS** vol 10 (Reissue) PARA 621 et seq. As to the Lord Chief Justice see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 303; **COURTS** vol 10 (Reissue) PARA 515.

UPDATE

1226 Composition of the arbitral tribunal and procedure for the appointment of arbitrators

NOTE 19--Constitutional Reform Act 2005 Sch 11 para 1(2) in force on 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(4) THE ARBITRAL TRIBUNAL/(i) Appointment and Composition/1227. Appointment of sole arbitrator in case of default.

1227. Appointment of sole arbitrator in case of default.

Unless the parties¹ otherwise agree, where each of two parties to an arbitration agreement² is to appoint an arbitrator³ and one party (the 'party in default') refuses to do so, or fails to do so within the time specified⁴, the other party, having duly appointed his arbitrator, may give notice⁵ in writing⁶ to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator⁷. If the party in default does not within seven clear days of that notice being given make the required appointment, and notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator whose award will be binding on both parties as if he had been so appointed by agreement⁸. Where a sole arbitrator has been so appointed the party in default may, upon notice⁹ to the appointing party, apply to the court¹⁰ which may set aside the appointment¹¹. The permission of the court is required for any appeal from its decision¹².

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'arbitration agreement' see PARA 1213.

3 As to the meaning of 'arbitrator' see PARA 1219 note 5.

4 As to the reckoning of periods of time see PARA 1221 note 17. As to the power of the court to extend time limits see PARA 1221.

5 As to the meaning of 'notice' see PARA 1219 note 7.

6 As to the meaning of 'writing' see PARA 1213 note 4.

7 Arbitration Act 1996 s 17(1). As to the application of Pt I (ss 1-84) see PARA 1209.

8 Arbitration Act 1996 s 17(2). There is no failure of the procedure for the appointment of the arbitral tribunal if an appointment is duly made under s 17, unless that appointment is set aside: s 18(1). As to failure of the appointment procedure see PARA 1228.

9 As to the meaning of 'upon notice' see PARA 1221 note 7.

10 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

11 Arbitration Act 1996 s 17(3).

12 Arbitration Act 1996 s 17(4).

UPDATE

1227 Appointment of sole arbitrator in case of default

NOTE 7--The Arbitration Act 1996 s 17 does not apply where both parties are to jointly appoint a sole arbitrator: *Mylcrist Builders Ltd v Buck* [2008] EWHC 2172 (TCC), [2009] 2 All ER (Comm) 259.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(4) THE ARBITRAL TRIBUNAL/(i) Appointment and Composition/1228. Failure of the appointment procedure.

1228. Failure of the appointment procedure.

The parties¹ are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal². If or to the extent that there is no such agreement any party to the arbitration agreement³ may, upon notice⁴ to the other parties, apply to the court⁵ to exercise the power to⁶:

- (1) give directions as to the making of any necessary appointments⁷;
- (2) direct that the tribunal must be constituted by such appointments, or any one or more of them, as have been made⁸;
- (3) revoke any appointments already made⁹;
- (4) make any necessary appointments itself¹⁰.

An appointment so made by the court has effect as if made with the agreement of the parties¹¹. The permission of the court is required for any appeal from its decision¹².

In deciding whether to exercise, and in considering how to exercise, any of these powers¹³, the court must have due regard to any agreement of the parties as to the qualifications required of the arbitrators¹⁴.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 Arbitration Act 1996 s 18(1). There is no failure if an appointment is duly made under s 17 (the power to appoint sole arbitrator in case of default: see PARA 1227), unless that appointment is set aside: s 18(1). As to the application of Pt I (ss 1-84) see PARA 1209. As to how the court should deal with an application for the appointment of an arbitrator where the opposing party contends that there is a valid ADR process in existence see *Holloway v Chancery Mead Ltd* [2007] EWHC 2495 (TCC), [2008] 1 All ER (Comm) 653, 117 ConLR 30.

3 As to the meaning of 'arbitration agreement' see PARA 1213.

4 As to the meaning of 'upon notice' see PARA 1221 note 7.

5 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

6 Arbitration Act 1996 s 18(2). The powers of appointment conferred on the court by s 18(2) and set out in s 18(3) (see heads (1)-(4) in the text) are discretionary as is apparent from the language of s 19 (see the text to notes 13-14): *Villa Denizcilik Sanayi Ve Ticaret AS v Longen SA, The Villa* [1998] 1 Lloyd's Rep 195; *R Durnell & Sons Ltd v Secretary of State for Trade and Industry* [2001] 1 All ER (Comm) 41, [2001] 1 Lloyd's Rep 275. 'This discretion must be exercised judicially and consistently with the principles set out in the Arbitration Act 1996 s 1 and the residual discretion of the court': *R Durnell & Sons Ltd v Secretary of State for Trade and Industry* [2001] 1 All ER (Comm) 41 at 52, [2001] 1 Lloyd's Rep 275 per Judge Toulmin CMG QC. As to the principles of arbitration see PARA 1210.

7 Arbitration Act 1996 s 18(3)(a).

8 Arbitration Act 1996 s 18(3)(b).

9 Arbitration Act 1996 s 18(3)(c). As to the revocation of the authority of arbitrators see PARA 1232.

10 Arbitration Act 1996 s 18(3)(d). See *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (No 2)* [2005] EWHC 455 (Comm), [2005] 2 Lloyd's Rep 378 (application for court to appoint arbitrator granted because (1) the application was not premature, by reason of the fact that an appeal was pending on the issue of jurisdiction; (2) the outcome of the dispute could be profoundly affected by the forum in which it was decided, and so the court should exercise its discretion to give effect to the parties' rights and obligations; and (3) there was a dispute capable of being referred to arbitration).

- 11 Arbitration Act 1996 s 18(4).
- 12 Arbitration Act 1996 s 18(5). See also *Virdee v Viridi* [2003] EWCA Civ 41, [2003] All ER (D) 46 (Jan) (where the court had refused permission to appeal, the Court of Appeal had no jurisdiction to hear an appeal).
- 13 le under the Arbitration Act 1996 s 18: see the text and notes 1-12.
- 14 See the Arbitration Act 1996 s 19.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(4) THE ARBITRAL TRIBUNAL/(i) Appointment and Composition/1229. Functions of the chairman.

1229. Functions of the chairman.

Where the parties¹ have agreed that there is to be a chairman of the arbitral tribunal, they are free to agree what the functions of the chairman are to be in relation to the making of decisions, orders and awards². If or to the extent that there is no such agreement³, decisions, orders and awards must be made by all or a majority of the arbitrators⁴, including the chairman⁵, and the view of the chairman prevails in relation to a decision, order or award in respect of which there is neither unanimity nor a majority⁶.

- 1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.
- 2 Arbitration Act 1996 s 20(1). As to the application of Pt I (ss 1-84) see PARA 1209.
- 3 Arbitration Act 1996 s 20(2).
- 4 As to the meaning of 'arbitrator' see PARA 1219 note 5.
- 5 Arbitration Act 1996 s 20(3).
- 6 Arbitration Act 1996 s 20(4).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(4) THE ARBITRAL TRIBUNAL/(i) Appointment and Composition/1230. Functions of the umpire.

1230. Functions of the umpire.

Where the parties¹ have agreed that there is to be an umpire, they are free to agree what the functions of the umpire are to be, and in particular whether he is to attend the proceedings, and when he is to replace the other arbitrators² as the arbitral tribunal with power to make decisions, orders and awards³. If or to the extent that there is no such agreement⁴, then:

- (1) the umpire must attend the proceedings and be supplied with the same documents and other materials as are supplied to the other arbitrators⁵;
- (2) decisions, orders and awards must be made by the other arbitrators unless and until they cannot agree on a matter relating to the arbitration⁶; and in that event they must forthwith give notice⁷ in writing⁸ to the parties and the umpire,

whereupon the umpire must replace them as the tribunal with power to make decisions, orders and awards as if he were sole arbitrator⁹;

(3) if the arbitrators cannot agree but fail to give notice of that fact, or if any of them fails to join in the giving of notice, any party to the arbitral proceedings may, upon notice¹⁰ to the other parties and to the tribunal, apply to the court¹¹ which may order that the umpire is to replace the other arbitrators as the tribunal with power to make decisions, orders and awards as if he were sole arbitrator¹²;

(4) the permission of the court is required for any appeal from the court's decision¹³.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'arbitrator' see PARA 1219 note 5.

3 Arbitration Act 1996 s 21(1). As to the application of Pt I (ss 1-84) see PARA 1209.

4 Arbitration Act 1996 s 21(2).

5 Arbitration Act 1996 s 21(3).

6 Arbitration Act 1996 s 21(4).

7 As to the meaning of 'notice' see PARA 1219 note 7.

8 As to the meaning of 'writing' see PARA 1213 note 4.

9 Arbitration Act 1996 s 21(4).

10 As to the meaning of 'upon notice' see PARA 1221 note 7.

11 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

12 Arbitration Act 1996 s 21(5).

13 Arbitration Act 1996 s 21(6).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(4) THE ARBITRAL TRIBUNAL/(i) Appointment and Composition/1231. Decisions where there is no chairman or umpire.

1231. Decisions where there is no chairman or umpire.

Where the parties¹ agree that there will be two or more arbitrators² with no chairman³ or umpire⁴, the parties are free to agree how the arbitral tribunal is to make decisions, orders and awards⁵. If there is no such agreement, decisions, orders and awards must be made by all or a majority of the arbitrators⁶.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'arbitrator' see PARA 1219 note 5.

3 As to the functions of a chairman see PARA 1229.

4 As to the functions of an umpire see PARA 1230.

5 Arbitration Act 1996 s 22(1). As to the application of Pt I (ss 1-84) see PARA 1209.

6 Arbitration Act 1996 s 22(2).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(4) THE ARBITRAL TRIBUNAL/(ii) Revocation, Removal, Resignation or Death/1232. Revocation of arbitrator's authority.

(ii) Revocation, Removal, Resignation or Death

1232. Revocation of arbitrator's authority.

The parties¹ are free to agree in what circumstances the authority of an arbitrator² may be revoked³. If or to the extent that there is no such agreement⁴ then the authority of an arbitrator may not be revoked except by the parties acting jointly, or by an arbitral or other institution or person vested by the parties with powers in that regard⁵. Revocation of the authority of an arbitrator by the parties acting jointly must be agreed in writing⁶ unless the parties also agree, whether or not in writing, to terminate the arbitration agreement⁷.

This does not affect the power of the court⁸ to revoke an appointment⁹, or to remove an arbitrator on specified grounds¹⁰.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'arbitrator' see PARA 1219 note 5.

3 Arbitration Act 1996 s 23(1). As to the application of Pt I (ss 1-84) see PARA 1209.

4 Arbitration Act 1996 s 23(2).

5 Arbitration Act 1996 s 23(3).

6 As to the meaning of 'writing' see PARA 1213 note 4.

7 Arbitration Act 1996 s 23(4).

8 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

9 Ie under the Arbitration Act 1996 s 18 (powers exercisable in case of failure of appointment procedure): see PARA 1228.

10 Arbitration Act 1996 s 23(5). The grounds are specified in s 24: see PARA 1233.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(4) THE ARBITRAL TRIBUNAL/(ii) Revocation, Removal, Resignation or Death/1233. Power of court to remove an arbitrator.

1233. Power of court to remove an arbitrator.

A party¹ to arbitral proceedings may, upon notice² to the other parties, to the arbitrator³ concerned and to any other arbitrator, apply to the court⁴ to remove an arbitrator⁵ on any of the following grounds, namely⁶:

- (1) that circumstances exist that give rise to justifiable doubts as to his impartiality⁷;
- (2) that he does not possess the qualifications required by the arbitration agreement⁸;
- (3) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so⁹;
- (4) that he has refused or failed properly to conduct the proceedings, or to use all reasonable despatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant¹⁰.

If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court must not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person¹¹. The arbitral tribunal may continue the arbitral proceedings and make an award while such an application to the court is pending¹². Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement, if any, to fees or expenses, or the repayment of any fees or expenses already paid¹³. The arbitrator concerned is entitled to appear and be heard by the court before it makes any order under the provisions described above¹⁴. The permission of the court is required for any appeal from its decision¹⁵.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'upon notice' see PARA 1221 note 7.

3 As to the meaning of 'arbitrator' see PARA 1219 note 5.

4 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

5 Where an arbitration claim is made under the Arbitration Act 1996 s 24 each arbitrator must be a defendant: CPR 62.6(1); and see PARA 1286.

6 Arbitration Act 1996 s 24(1). The provisions of s 24 are mandatory: see PARA 1211. As to the application of Pt I (ss 1-84) see PARA 1209.

It has been said that the 'power to remove an arbitrator is a draconian one and the court will not exercise that power lightly': *Dredging and Construction Co Ltd v Delta Civil Engineering Co Ltd (No 2)* (2000) 72 ConLR 99 at 117 per Judge Wilcox.

7 Arbitration Act 1996 s 24(1)(a). Section 24(1)(a) raises the same test as the objective test under the common law regarding disqualification for bias in respect of judges and arbitrators. That test is in two parts. First there is the automatic disqualification that arises from direct or indirect pecuniary interest; and secondly there is the test in *R v Gough* [1993] AC 646, [1992] 4 All ER 481, CA, namely whether there is a real likelihood, understood to mean a real possibility, of bias: *Save and Prosper Pensions Ltd v Homebase Ltd* (2 March 2000, unreported). In general, a relationship between an arbitrator and a company associated with one of the parties to the arbitration is likely to give rise to a real possibility of bias; however, the degree of association between related companies may be highly relevant as to whether or not a reasonable bystander would say that there was a real possibility of bias: *Save and Prosper Pensions Ltd v Homebase Ltd* (2 March 2000, unreported). See *Turner v Stevenage Borough Council* [1998] Ch 28, [1997] 3 WLR 309, CA (even if an arbitrator had no right to make a demand for interim payment, his subsequent actions in initially accepting the council's payment and his delay in returning it did not create an appearance of bias or amount to misconduct); *Andrews (t/a BA Contractors) v Bradshaw* [2000] BLR 6, CA (arbitrator showing irritation and lack of patience not biased). The court may only remove an arbitrator if it finds that circumstances exist, and are not merely believed to exist, and that they justify doubts as to impartiality: *Laker Airways Inc v FLS Aerospace Ltd* [2000] 1 WLR 113, [1999] 2 Lloyd's Rep 45 (barrister acting as arbitrator was impartial, and not removed, although a member of his set of chambers was representing one of the parties in the arbitration). Where an arbitrator is conducting an international arbitration governed by English law, the test for apparent or unconscious bias is whether there is

any real danger of actual bias: *AT & T Corpn v Saudi Cable Co* [2000] 2 All ER (Comm) 625, [2000] 2 Lloyd's Rep 127, CA. See also *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm), [2005] All ER (D) 271 (Nov); *Norbrook Laboratories Ltd v A Tank* [2006] EWHC 1055 (Comm), [2006] 2 Lloyd's Rep 485, [2006] BLR 412; *ASM Shipping Ltd v Harris* [2007] EWHC 1513 (Comm), [2008] 1 Lloyd's Rep 61, (2007) Times, 6 August.

8 Arbitration Act 1996 s 24(1)(b). See also *Sumukan v Commonwealth Secretariat (No 2)* [2007] EWCA Civ 1148, [2008] 1 Lloyd's Rep 40, 116 ConLR 17. As to the meaning of 'arbitration agreement' see PARA 1213.

9 Arbitration Act 1996 s 24(1)(c).

10 Arbitration Act 1996 s 24(1)(d). For an injustice to be 'substantial' for the purposes of s 24(1), it must be shown to have a real existence and to be of a significant amount, quantity, or dimension; the measure of substantiality is not limited to purely monetary terms: *Groundshire v VHE Construction* [2001] BLR 395.

11 Arbitration Act 1996 s 24(2).

12 Arbitration Act 1996 s 24(3).

13 Arbitration Act 1996 s 24(4). The provisions relating to the joint and several liability of parties to arbitrators for fees and expenses have effect subject to any order of the court under s 24(4); see s 28(4); and PARA 1236.

14 Arbitration Act 1996 s 24(5).

15 Arbitration Act 1996 s 24(6). See *Miller Construction Ltd v James Moore Earthmoving* [2001] EWCA Civ 654, [2001] 2 All ER (Comm) 598, [2001] BLR 322 where the appeal was compromised by the parties, but Potter LJ observed (at 599-560) that: 'it was not appropriate to make a finding of misconduct without at least giving the arbitrator notice of the ground upon which such a finding would or might be based'.

UPDATE

1233 Power of court to remove an arbitrator

NOTE 8--*Sumukan*, cited, reported at [2008] 2 All ER (Comm) 175.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(4) THE ARBITRAL TRIBUNAL/(ii) Revocation, Removal, Resignation or Death/1234. Resignation or death.

1234. Resignation or death.

The parties¹ are free to agree with an arbitrator² as to the consequences of his resignation as regards his entitlement, if any, to fees or expenses and any liability thereby incurred by him³. If or to the extent that there is no such agreement⁴, then an arbitrator who resigns his appointment may (upon notice⁵ to the parties) apply to the court⁶ to grant him relief from any liability thereby incurred by him⁷, and to make such order as it thinks fit with respect to his entitlement, if any, to fees or expenses or the repayment of any fees or expenses already paid⁸. The permission of the court is required for any appeal from its decision⁹.

The authority of an arbitrator is personal and ceases on his death¹⁰. Unless otherwise agreed by the parties, the death of the person by whom an arbitrator was appointed does not revoke the arbitrator's authority¹¹.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'arbitrator' see PARA 1219 note 5.

3 Arbitration Act 1996 s 25(1). As to the application of Pt I (ss 1-84) see PARA 1209. As to the joint and several liability of the parties to arbitrators for fees and expenses see PARA 1236. As to the immunity of arbitrators see PARA 1237.

4 Arbitration Act 1996 s 25(2).

5 As to the meaning of 'upon notice' see PARA 1221 note 7.

6 Arbitration Act 1996 s 25(3). As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

7 Arbitration Act 1996 s 25(3)(a). If the court is satisfied that in all the circumstances it was reasonable for the arbitrator to resign, it may grant such relief as is mentioned in s 25(3)(a) on such terms as it thinks fit: s 25(4).

8 Arbitration Act 1996 s 25(3)(b). The provisions relating to the joint and several liability of parties to arbitrators for fees and expenses have effect subject to any order of the court under s 25(3)(b): see s 28(4); and PARA 1236.

9 Arbitration Act 1996 s 25(5).

10 Arbitration Act 1996 s 26(1). The provisions of s 26(1) are mandatory: see PARA 1211.

11 Arbitration Act 1996 s 26(2).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(4) THE ARBITRAL TRIBUNAL/(ii) Revocation, Removal, Resignation or Death/1235. Filling of a vacancy.

1235. Filling of a vacancy.

Where an arbitrator¹ ceases to hold office², the parties³ are free to agree⁴ (1) whether and, if so, how the vacancy is to be filled⁵; (2) whether and, if so, to what extent the previous proceedings should stand⁶; and (3) what effect, if any, his ceasing to hold office has on any appointment made by him, alone or jointly⁷.

If or to the extent that there is no such agreement⁸, then (a) the provisions relating to the procedure for the appointment of arbitrators⁹ and the failure of the appointment procedure¹⁰ apply in relation to the filling of the vacancy as in relation to an original appointment¹¹; (b) the arbitral tribunal, when reconstituted, must determine whether and, if so, to what extent the previous proceedings should stand, although this does not affect any right of a party to challenge those proceedings on any ground which had arisen before the arbitrator ceased to hold office¹²; and (c) the arbitrator's ceasing to hold office does not affect any appointment by him, alone or jointly, of another arbitrator, in particular any appointment of a chairman or umpire¹³.

1 As to the meaning of 'arbitrator' see PARA 1219 note 5.

2 As to the revocation of an arbitrator's authority see PARA 1232. As to the power of the court to remove arbitrators see PARA 1233. As to the resignation or death of arbitrators see PARA 1234.

3 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

4 Arbitration Act 1996 s 27(1). As to the application of Pt I (ss 1-84) see PARA 1209.

5 Arbitration Act 1996 s 27(1)(a). Where there is no agreement for the filling of vacancies, any agreement on the procedure for appointment of arbitrators should be applied as far as possible to the filling of a vacancy: *Federal Insurance Co v Transamerica Occidental Life Insurance Co* [1999] 2 All ER (Comm) 138, [1999] 2 Lloyd's Rep 286.

6 Arbitration Act 1996 s 27(1)(b).

7 Arbitration Act 1996 s 27(1)(c).

8 Arbitration Act 1996 s 27(2).

9 Ie the Arbitration Act 1996 s 16: see PARA 1226.

10 Ie the Arbitration Act 1996 s 18: see PARA 1228.

11 Arbitration Act 1996 s 27(3). In practice it would be very unusual for an arbitration agreement to address expressly the procedures for filling a vacancy created when an arbitrator ceases to hold office. Where s 16 has to be resorted to, the parties' agreement on the procedure for the original appointment of arbitrators should be applied as far as possible in relation to the filling of a vacancy of an arbitrator, and some degree of manipulation of the appointment code is likely to be necessary: *Federal Insurance Co v Transamerica Occidental Life Insurance Co* [1999] 2 All ER (Comm) 138, [1999] 2 Lloyd's Rep 286.

12 Arbitration Act 1996 s 27(4).

13 Arbitration Act 1996 s 27(5). As to the functions of a chairman see PARA 1229; and as to the functions of an umpire see PARA 1230.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(4) THE ARBITRAL TRIBUNAL/(iii) Fees and Expenses/1236. Joint and several liability to pay arbitrators' fees and expenses.

(iii) Fees and Expenses

1236. Joint and several liability to pay arbitrators' fees and expenses.

The parties¹ are jointly and severally liable to pay to the arbitrators² such reasonable fees and expenses, if any, as are appropriate in the circumstances³. Any party may apply to the court⁴, upon notice⁵ to the other parties and to the arbitrators⁶; and the court may order that the amount of the arbitrators' fees and expenses is to be considered and adjusted by such means and upon such terms as it may direct⁷. If the application is made after any amount has been paid to the arbitrators by way of fees or expenses, the court may order the repayment of such amount, if any, as is shown to be excessive, but must not do so unless it is shown that it is reasonable in the circumstances to order repayment⁸.

The provisions described above do not affect any liability of a party to any other party to pay all or any of the costs of the arbitration⁹ or any contractual right of an arbitrator to payment of his fees and expenses¹⁰.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 For the purposes of the Arbitration Act 1996 s 28, references to 'arbitrators' include an arbitrator who has ceased to act and an umpire who has not replaced the other arbitrators: s 28(6). As to the meaning of 'arbitrator' generally see PARA 1219 note 5. As to the functions of an umpire see PARA 1230.

3 Arbitration Act 1996 s 28(1). The provisions of s 28 are mandatory: see PARA 1211. As to the application of Pt I (ss 1-84) see PARA 1209. Any agreement between the parties as to the amount of fees payable to the arbitrators must be clear: *Hussman (Europe) Ltd v Al Ameen Development and Trade Co* [2000] 2 Lloyd's Rep 83.

The provisions of the Arbitration Act 1996 s 28(1)-(3) have effect subject to any order of the court under s 24(4) (entitlement to fees or expenses in case of removal of arbitrator: see PARA 1233) or s 25(3)(b) (entitlement to fees or expenses in case of resignation of arbitrator: see PARA 1234): s 28(4).

4 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

5 As to the meaning of 'upon notice' see PARA 1221 note 7.

6 Where an arbitration claim is made under the Arbitration Act 1996 s 28 each arbitrator must be a defendant: CPR 62.6(1); and see PARA 1286.

7 Arbitration Act 1996 s 28(2). See note 3. See also *Hussman (Europe) Ltd v Al Ameen Development and Trade Co* [2000] 2 Lloyd's Rep 83 (where an arbitrator's fees were calculated on the basis of an hourly rate of £140 it was not reasonable that he should charge extra for typing services).

The power of the court in the Arbitration Act 1996 s 28(2) may be exercised by a judge-arbitrator, subject to the powers of the Court of Appeal under s 24(4) (directions as to entitlement to fees or expenses in case of removal) (see PARA 1233) and s 25(3)(b) (directions as to entitlement to fees or expenses in case of resignation) (see PARA 1234): s 93(6), Sch 2 para 3(1), (2). As to the meaning of 'Court of Appeal' see PARA 1219 note 7. See *Agrimex Ltd v Tradigrain SA* [2003] EWHC 1656 (Comm), [2003] 2 Lloyd's Rep 537 (costs adjusted as fees claimed by draftsman employed to draft the award were disproportionate).

8 Arbitration Act 1996 s 28(3). See note 3.

9 See the Arbitration Act 1996 ss 59-65; and PARAS 1270-1273.

10 Arbitration Act 1996 s 28(5).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(4) THE ARBITRAL TRIBUNAL/(iv) Immunity/1237. Immunity of arbitrators.

(iv) Immunity

1237. Immunity of arbitrators.

An arbitrator¹ is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith².

The same immunity applies to an employee or agent of an arbitrator as it applies to the arbitrator himself³.

1 As to the meaning of 'arbitrator' see PARA 1219 note 5.

2 Arbitration Act 1996 s 29(1). This does not affect any liability incurred by an arbitrator by reason of his resigning: s 29(3). See, however, s 25; and PARA 1234.

The provisions of s 29 are mandatory: see PARA 1211. As to the application of Pt I (ss 1-84) see PARA 1209.

3 Arbitration Act 1996 s 29(2).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(4) THE ARBITRAL TRIBUNAL/(iv) Immunity/1238. Immunity of arbitral institutions.

1238. Immunity of arbitral institutions.

An arbitral or other institution or person designated or requested by the parties¹ to appoint or nominate an arbitrator² is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith³. An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted by the arbitrator, or his employees or agents, in the discharge or purported discharge of his functions as arbitrator⁴.

The same immunity applies to an employee or agent of an arbitral or other institution or person as it applies to the institution or person himself⁵.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'arbitrator' see PARA 1219 note 5. As to the procedure for appointment of arbitrators see PARA 1226.

3 Arbitration Act 1996 s 74(1). The provisions of s 74 are mandatory: see PARA 1211. As to the application of Pt I (ss 1-84) see PARA 1209.

4 Arbitration Act 1996 s 74(2).

5 Arbitration Act 1996 s 74(3).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(5) JURISDICTION OF THE ARBITRAL TRIBUNAL/1239. Competence of the arbitral tribunal to rule on its own substantive jurisdiction.

(5) JURISDICTION OF THE ARBITRAL TRIBUNAL

1239. Competence of the arbitral tribunal to rule on its own substantive jurisdiction.

Unless otherwise agreed by the parties¹, the arbitral tribunal² may rule on its own substantive jurisdiction³, that is:

- (1) as to whether there is a valid arbitration agreement⁴;
- (2) as to whether the tribunal is properly constituted⁵; and
- (3) as to what matters have been submitted to arbitration in accordance with the arbitration agreement⁶.

Any such ruling may be challenged by any available arbitral process⁷ of appeal or review⁸.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

3 Arbitration Act 1996 s 30(1). As to the application of Pt I (ss 1-84) see PARA 1209. 'Substantive jurisdiction', in relation to an arbitral tribunal, refers to the matters specified in s 30(1)(a)-(c) (see heads (1)-(3) in the text), and references to the tribunal exceeding its substantive jurisdiction must be construed accordingly:

s 82(1). As to objections to the substantive jurisdiction of tribunals see PARA 1240. As to the determination of the preliminary point of jurisdiction see PARA 1241. As to the enforcement of an award (where the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award) see PARA 1274. As to challenging an award of the arbitral tribunal in connection with its substantive jurisdiction see PARA 1276. As to the loss of the right to object see PARA 1282.

4 Arbitration Act 1996 s 30(1)(a). As to the meaning of 'arbitration agreement' see PARA 1213. As to the separability of an arbitration agreement, whereby an arbitration agreement which forms or was intended to form part of another agreement may be treated as a distinct agreement, see PARA 1214.

The fact that, in the absence of contrary agreement, s 30 confers power on an arbitral tribunal to determine its own jurisdiction does not mean that the court must always refer a dispute about whether or not an arbitration agreement exists, or its scope, to the tribunal: *Birse Construction Ltd v St David Ltd* [1999] BLR 194, quoted with approval in *Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522, [2000] BLR 150, CA. See PARA 1222 note 5.

In relation to a statutory arbitration, the reference in the Arbitration Act 1996 s 30(1)(a) to whether there is a valid arbitration agreement must be construed as a reference to whether the enactment applies to the dispute or difference in question: s 96(1), (2). As to the meaning of 'enactment' see PARA 1209 note 6. As to statutory arbitrations see PARA 1209 note 7.

5 Arbitration Act 1996 s 30(1)(b). As to whether the tribunal is properly constituted see PARA 1226 et seq.

6 Arbitration Act 1996 s 30(1)(c).

7 As to the meaning of 'available arbitral process' see PARA 1221 note 8.

8 Arbitration Act 1996 s 30(2).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(5) JURISDICTION OF THE ARBITRAL TRIBUNAL/1240. Objection to substantive jurisdiction of the arbitral tribunal.

1240. Objection to substantive jurisdiction of the arbitral tribunal.

An objection that the arbitral tribunal¹ lacks substantive jurisdiction² at the outset of the proceedings must be raised by a party³ not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction⁴. A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator⁵. Any objection during the course of the arbitral proceedings that the tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised⁶. The tribunal may admit an objection later than the times specified above if it considers the delay justified⁷. Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may rule on the matter in an award as to jurisdiction, or deal with the objection in its award on the merits⁸. If the parties agree which of these courses the tribunal should take, the tribunal must proceed accordingly⁹. The tribunal may in any case, and must if the parties so agree, stay proceedings whilst an application is made to the court¹⁰ for the determination of a preliminary point of jurisdiction¹¹.

1 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

2 As to the meaning of 'substantive jurisdiction' see PARA 1239 note 3. As to the competence of the tribunal to rule on its own jurisdiction see PARA 1239. As to the determination of the preliminary point of jurisdiction see PARA 1241. As to the enforcement of an award (where the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award) see PARA 1274. As to challenging an award of the arbitral tribunal in connection with its substantive jurisdiction see PARA 1276. As to the loss of the right to object see PARA 1282.

- 3 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.
- 4 Arbitration Act 1996 s 31(1). The provisions of s 31 are mandatory: see PARA 1211. As to the application of Pt I (ss 1-84) see PARA 1209.
- 5 Arbitration Act 1996 s 31(1). As to the meaning of 'arbitrator' see PARA 1219 note 5.
- 6 Arbitration Act 1996 s 31(2).
- 7 Arbitration Act 1996 s 31(3).
- 8 Arbitration Act 1996 s 31(4). An arbitrator's decision determining the question of his own jurisdiction is only the first step in doing so and is not final: *Weissfisch v Julius* [2006] EWCA Civ 218, [2006] 2 All ER (Comm) 504, [2006] 1 Lloyd's Rep 716.
- 9 Arbitration Act 1996 s 31(4).
- 10 le under the Arbitration Act 1996 s 32: see PARA 1241. As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.
- 11 Arbitration Act 1996 s 31(5).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(5) JURISDICTION OF THE ARBITRAL TRIBUNAL/1241. Determination of a preliminary point of jurisdiction.

1241. Determination of a preliminary point of jurisdiction.

The court¹ may, on the application of a party² to arbitral proceedings, and upon notice³ to the other parties, determine any question as to the substantive jurisdiction⁴ of the arbitral tribunal⁵. An application must not be considered unless it is made⁶:

- (1) with the agreement in writing⁷ of all the other parties to the proceedings⁸; or
- (2) with the permission of the tribunal, and the court is satisfied that⁹:
 1. (a) the determination of the question is likely to produce substantial savings in costs¹⁰;
 2. (b) the application was made without delay¹¹; and
 3. (c) there is good reason why the matter should be decided by the court¹².

An application, unless made with the agreement of all the other parties to the proceedings, must state the grounds on which it is said that the matter should be decided by the court¹³. Unless otherwise agreed by the parties, the tribunal may continue the arbitral proceedings and make an award while such an application is pending¹⁴.

The decision of the court on the question of jurisdiction is treated as a judgment of the court for the purposes of an appeal, but no appeal lies without the permission of the court which must not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal¹⁵.

1 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20. See also note 15.

2 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

3 As to the meaning of 'upon notice' see PARA 1221 note 7.

4 As to the meaning of 'substantive jurisdiction' see PARA 1239 note 3. As to the competence of the tribunal to rule on its own jurisdiction see PARA 1239. As to objections to the substantive jurisdiction of tribunals see PARA 1240. As to the enforcement of an award (where the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award) see PARA 1274. As to challenging an award of the arbitral tribunal in connection with its substantive jurisdiction see PARA 1276.

5 Arbitration Act 1996 s 32(1). A party may lose the right to object: s 32(1); and see PARA 1282. The provisions of s 32 are mandatory: see PARA 1211. As to the application of Pt I (ss 1-84) see PARA 1209. As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

Section 32 was intended to provide that an application to the court would only be made in strictly limited circumstances: *Vale Do Rio Doce Navegação SA v Shanghai Bao Steel Ocean Shipping Co Ltd (t/a Bao Steel Ocean Shipping Co)* [2000] 2 All ER (Comm) 70, [2000] 2 Lloyd's Rep 1. A party who wishes the court to determine any question relating to the substantive jurisdiction of the tribunal is not entitled to apply for a declaration at common law, but must make an application under the Arbitration Act 1996 s 32: *ABB Lummus Global Ltd (formerly Far East Livingston Shipbuilding Ltd) v Keppel Fels Ltd* [1999] 2 Lloyd's Rep 24. The determination of whether there is an arbitral agreement is regulated by the Arbitration Act 1996 Pt I and, in accordance with s 1(c) (see PARA 1210), the court must approach the application on the basis that it should not intervene except in the circumstances specified in Pt I: *Vale Do Rio Doce Navegação SA v Shanghai Bao Steel Ocean Shipping Co Ltd (t/a Bao Steel Ocean Shipping Co)* [2000] 2 All ER (Comm) 70, [2000] 2 Lloyd's Rep 1. The effect of the Arbitration Act 1996 s 32 is to prevent a party from issuing an application to the court seeking a declaration as to the existence of an arbitration agreement even though no arbitrator has been appointed and that party is not a party to arbitral proceedings: see *Vale Do Rio Doce Navegação SA v Shanghai Bao Steel Ocean Shipping Co Ltd (t/a Bao Steel Ocean Shipping Co)* [2000] 2 All ER (Comm) 70, [2000] 2 Lloyd's Rep 1. See also *Law Debenture Trust Corpn plc v Elektrim Finance BV* [2005] EWHC 1412 (Ch), [2005] 2 All ER (Comm) 476, [2005] 2 Lloyd's Rep 755.

6 Arbitration Act 1996 s 32(2). Unless the court gives permission, no appeal lies from a decision of the court whether these conditions are met: s 32(5). See *Vale Do Rio Doce Navegação SA v Shanghai Bao Steel Ocean Shipping Co Ltd (t/a Bao Steel Ocean Shipping Co)* [2000] 2 All ER (Comm) 70, [2000] 2 Lloyd's Rep 1.

7 As to the meaning of 'writing' see PARA 1213 note 4.

8 Arbitration Act 1996 s 32(2)(a).

9 Arbitration Act 1996 s 32(2)(b).

10 Arbitration Act 1996 s 32(2)(b)(i).

11 Arbitration Act 1996 s 32(2)(b)(ii).

12 Arbitration Act 1996 s 32(2)(b)(iii).

13 Arbitration Act 1996 s 32(3).

14 Arbitration Act 1996 s 32(4).

15 Arbitration Act 1996 s 32(6). As to the meaning of 'Court of Appeal' see PARA 1219 note 7. In the case of a judge-arbitrator, the reference in s 32(6) to the Court of Appeal is to be construed as a reference to the House of Lords: s 93(6), Sch 2 para 2(2). As from a day to be appointed, this provision is amended by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 60 so as to refer to the Supreme Court instead of the House of Lords. At the date at which this volume states the law, no such day had been appointed.

UPDATE

1241 Determination of a preliminary point of jurisdiction

NOTE 15--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(5) JURISDICTION OF THE ARBITRAL TRIBUNAL/1242. Jurisdiction over third parties.

1242. Jurisdiction over third parties.

Since arbitration is based on the principle of consensual submission of a dispute for resolution¹, a third party (that is, a person who is not a party to the relevant arbitration agreement) may not be brought into the arbitration proceedings by one party unilaterally, in contrast to the position in litigation generally². A third party may only be joined in an arbitration with the consent of all the parties to the agreement. The power under the Arbitration Act 1996 to consolidate arbitral proceedings or hold concurrent hearings where all parties consent³ does not itself provide for the compulsory joinder of a third party even where common questions of fact or law arise which affect all parties.

- 1 See PARA 1201.
- 2 See **CIVIL PROCEDURE** vol 11 (2009) PARA 210 et seq.
- 3 See the Arbitration Act 1996 s 35; and PARA 1249.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(6) DUTIES AND POWERS OF THE ARBITRAL TRIBUNAL AND CONDUCT OF THE ARBITRAL PROCEEDINGS/1243. General duty of the arbitral tribunal.

(6) DUTIES AND POWERS OF THE ARBITRAL TRIBUNAL AND CONDUCT OF THE ARBITRAL PROCEEDINGS

1243. General duty of the arbitral tribunal.

The arbitral tribunal¹ must:

- (1) act fairly and impartially as between the parties², giving each party a reasonable opportunity of putting his case and dealing with that of his opponent³;
- (2) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined⁴; and
- (3) comply with the general duty in heads (1) and (2) above in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence⁵ and in the exercise of all other powers conferred on it⁶.

- 1 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.
- 2 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

3 Arbitration Act 1996 s 33(1)(a). The provisions of s 33 are mandatory: see PARA 1211. As to the application of Pt I (ss 1-84) see PARA 1209.

Simply because an award contains an error which is unfair to a party, it does not follow that there has been a failure by the tribunal to comply with the requirements of s 33: *Weldon Plant Ltd v Commission for New Towns* [2001] 1 All ER (Comm) 264, 77 ConLR 1. See *Pacol Ltd v Joint Stock Co Rossakhar* [1999] 2 All ER (Comm) 778, [2000] 1 Lloyd's Rep 109 (court held that there had been a serious irregularity within the meaning of the Arbitration Act 1996 s 68(1) (see PARA 1277), implicitly holding that there had been a breach of the duty to act fairly under s 33); *Apis AS v Fantazia Kereskedelmi KFT* [2001] 1 All ER (Comm) 348 (award challenged on the ground of serious irregularity because one party had not had the opportunity to respond to the other party's evidence). See also *Minermet SpA Milan v Luckyfield Shipping Corpn SA* [2004] EWHC 729 (Comm), [2004] 2 Lloyd's Rep 348 (arbitration clause required parties to appoint arbitrators within specified time period, failing which first appointed arbitrator would be sole arbitrator; not unfair for party which appointed arbitrator to insist arbitrator should become sole arbitrator in accordance with clause).

If an arbitrator is aware that a party has missed a point, the arbitrator is required, in the interest of fairness, to mention it so that the party can deal with it; but where there is no such appreciation, it is not unfair for the arbitrator to leave it to counsel to take such points as he wishes: *Bandwidth Shipping Corpn v Intaari* [2007] EWCA Civ 998, [2008] 1 All ER (Comm) 1015, [2008] 1 Lloyd's Rep 7.

The tribunal's discretion to award costs under the Arbitration Act 1996 s 61 (see PARA 1271) is subject to the general duty under s 33(1)(a) to act fairly and impartially as between the parties: *Gbangbola v Smith & Sherriff Ltd* [1998] 3 All ER 730.

4 Arbitration Act 1996 s 33(1)(b).

5 As to the powers of the tribunal in connection with procedural and evidential matters see PARA 1245. For the duty of the parties to comply with any determination of the tribunal as to procedural or evidential matters see PARA 1244. As to securing the attendance of witnesses see PARA 1253.

6 Arbitration Act 1996 s 33(2). A failure by the tribunal to comply with s 33, which the court considers has caused or will cause substantial injustice to the applicant, is a serious irregularity and a ground on which the award may be challenged: see s 68(2)(a); and PARA 1277.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(6) DUTIES AND POWERS OF THE ARBITRAL TRIBUNAL AND CONDUCT OF THE ARBITRAL PROCEEDINGS/1244. General duty of the parties.

1244. General duty of the parties.

The parties¹ must do all things necessary for the proper and expeditious conduct of the arbitral proceedings². This includes complying without delay with any determination of the arbitral tribunal³ as to procedural or evidential matters⁴, or with any order or directions of the tribunal, and, where appropriate, taking without delay any necessary steps to obtain a decision of the court⁵ on a preliminary question of jurisdiction or law⁶.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 Arbitration Act 1996 s 40(1). The provisions of s 40 are mandatory: see PARA 1211. As to the application of Pt I (ss 1-84) see PARA 1209. 'The obligations of the parties set out in s 40 are statutory obligations, not obligations that could be an implied term in the contract to arbitrate contained in the arbitration agreement . . . or any agreement to arbitrate a particular dispute, which could be displaced by any express agreement in different terms. Therefore the concepts of 'breach' of 'implied terms' and 'repudiation/renunciation' of the contract to arbitrate, are inapposite. If a party fails to fulfil its obligations under s 40, the answer is to use the statutory remedies, as set out in ss 41 and 42 of the 1996 Act': *Elektrim SA v Vivendi Universal SA* [2007] EWHC 11 (Comm) at [71], [2007] 2 All ER (Comm) 365 at [71], [2007] 1 Lloyd's Rep 693, per Aikens J.

For the powers of the arbitral tribunal or the court in the case of a party's default see PARAS 1250, 1252.

3 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

4 For the duty of the tribunal in connection with decisions on procedural and evidential matters see PARA 1243. As to the powers of the tribunal in connection with procedural and evidential matters see PARA 1245.

5 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

6 Arbitration Act 1996 s 40(2). 'Question of law' means, for a court in England and Wales, a question of the law of England and Wales and, for a court in Northern Ireland, a question of the law of Northern Ireland: s 82(1). As to the determination of a preliminary point of jurisdiction see PARA 1241; and as to the determination of a preliminary point of law see PARA 1255.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(6) DUTIES AND POWERS OF THE ARBITRAL TRIBUNAL AND CONDUCT OF THE ARBITRAL PROCEEDINGS/1245. Procedural and evidential matters.

1245. Procedural and evidential matters.

The arbitral tribunal¹ decides all procedural and evidential matters², subject to the right of the parties³ to agree any matter⁴. Procedural and evidential matters include⁵:

- (1) when and where any part of the proceedings is to be held⁶;
- (2) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied⁷;
- (3) whether any and, if so, what form of written⁸ statements of claim and defence are to be used, when these should be supplied, and the extent to which such statements can be later amended⁹;
- (4) whether any and, if so, which documents or classes of documents should be disclosed between and produced by the parties, and at what stage¹⁰;
- (5) whether any and, if so, what questions should be put to and answered by the respective parties, and when and in what form this should be done¹¹;
- (6) whether to apply strict rules of evidence, or any other rules, as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented¹²;
- (7) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law¹³; and
- (8) whether and to what extent there should be oral or written evidence or submissions¹⁴.

The tribunal may fix the time within which any directions given by it are to be complied with¹⁵, and may if it thinks fit extend the time so fixed¹⁶, whether or not it has expired¹⁷.

1 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

2 For the duty of the tribunal in connection with decisions on procedural and evidential matters see PARA 1243. For the duty of the parties to comply with any determination of the tribunal as to procedural or evidential matters see PARA 1244. As to securing the attendance of witnesses see PARA 1253.

3 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

4 Arbitration Act 1996 s 34(1). As to the application of Pt I (ss 1-84) see PARA 1209.

5 Arbitration Act 1996 s 34(2).

6 Arbitration Act 1996 s 34(2)(a).

7 Arbitration Act 1996 s 34(2)(b).

8 As to the meaning of 'written' see PARA 1213 note 4.

9 Arbitration Act 1996 s 34(2)(c).

10 Arbitration Act 1996 s 34(2)(d). Materials produced for arbitration are subject to an implied term of confidentiality as a matter of law: *Ali Shipping Corpn v Shipyard Trogir* [1998] 2 All ER 136, [1999] 1 WLR 314, CA.

11 Arbitration Act 1996 s 34(2)(e).

12 Arbitration Act 1996 s 34(2)(f).

13 Arbitration Act 1996 s 34(2)(g).

14 Arbitration Act 1996 s 34(2)(h).

15 For the duty of the parties to comply with any directions of the tribunal see PARA 1244. For the powers of the tribunal or the court in case of a party's default see PARAS 1250, 1252.

16 As to the reckoning of periods of time see PARA 1221 note 17. As to the power of the court to extend time limits see PARA 1221.

17 Arbitration Act 1996 s 34(3).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(6) DUTIES AND POWERS OF THE ARBITRAL TRIBUNAL AND CONDUCT OF THE ARBITRAL PROCEEDINGS/1246. Representation in the arbitral proceedings.

1246. Representation in the arbitral proceedings.

Unless otherwise agreed by the parties¹, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him².

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 Arbitration Act 1996 s 36. As to the application of Pt I (ss 1-84) see PARA 1209.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(6) DUTIES AND POWERS OF THE ARBITRAL TRIBUNAL AND CONDUCT OF THE ARBITRAL PROCEEDINGS/1247. Appointment of experts, legal advisers and assessors.

1247. Appointment of experts, legal advisers and assessors.

Unless otherwise agreed by the parties¹, the arbitral tribunal² may appoint experts or legal advisers to report to the tribunal and the parties, or appoint assessors to assist the tribunal on technical matters; and it may allow any such expert, legal adviser or assessor to attend the

proceedings³. The parties must be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person⁴.

The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators⁵ are liable are expenses of the arbitrators for the purposes of Part I of the Arbitration Act 1996⁶.

- 1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.
- 2 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.
- 3 Arbitration Act 1996 s 37(1)(a). As to the application of Pt I (ss 1-84) see PARA 1209.
- 4 Arbitration Act 1996 s 37(1)(b).
- 5 As to the meaning of 'arbitrator' see PARA 1219 note 5.
- 6 Arbitration Act 1996 s 37(2). The provisions of s 37(2) are mandatory: see PARA 1211. As to the fees and expenses of arbitrators see PARAS 1233-1234, 1236. As to the costs of the arbitration see PARA 1270 et seq.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(6) DUTIES AND POWERS OF THE ARBITRAL TRIBUNAL AND CONDUCT OF THE ARBITRAL PROCEEDINGS/1248. General powers exercisable by the arbitral tribunal in relation to the proceedings.

1248. General powers exercisable by the arbitral tribunal in relation to the proceedings.

The parties¹ are free to agree on the powers exercisable by the arbitral tribunal² for the purposes of and in relation to the proceedings³. Unless otherwise agreed by the parties, the tribunal has the power to⁴:

- (1) order⁵ a claimant⁶ to provide security for the costs of the arbitration⁷;
- (2) give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings⁸;
4. (a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party⁹; or
5. (b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property¹⁰;
- (3) direct that a party or witness be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation¹¹;
- (4) give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control¹².

- 1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.
- 2 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.
- 3 Arbitration Act 1996 s 38(1). As to the application of Pt I (ss 1-84) see PARA 1209.
- 4 Arbitration Act 1996 s 38(2).

5 For the duty of the parties to comply with any order or directions of the tribunal see PARA 1244. For the powers of the tribunal or the court in case of a party's default see PARAS 1250, 1252.

6 As to the meaning of 'claimant' see PARA 1221 note 3.

7 Arbitration Act 1996 s 38(3). As to the costs of the arbitration see PARA 1270 et seq. This power must not be exercised on the ground that the claimant is an individual ordinarily resident outside the United Kingdom (s 38(3)(a)), or a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom (s 38(3)(b)). As to the meaning of 'United Kingdom' see PARA 1202 note 6.

8 Arbitration Act 1996 s 38(4).

9 Arbitration Act 1996 s 38(4)(a).

10 Arbitration Act 1996 s 38(4)(b).

11 Arbitration Act 1996 s 38(5).

12 Arbitration Act 1996 s 38(6).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(6) DUTIES AND POWERS OF THE ARBITRAL TRIBUNAL AND CONDUCT OF THE ARBITRAL PROCEEDINGS/1249. Consolidation of arbitral proceedings and concurrent hearings.

1249. Consolidation of arbitral proceedings and concurrent hearings.

The parties¹ are free to agree that the arbitral proceedings be consolidated with other arbitral proceedings, or that concurrent hearings be held, on such terms as may be agreed². Unless the parties agree to confer such power on the arbitral tribunal³, the tribunal has no power to order consolidation of proceedings or concurrent hearings⁴.

In relation to a statutory arbitration⁵, this power applies only so as to authorise the consolidation of proceedings, or concurrent hearings in proceedings, under the same enactment⁶.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 Arbitration Act 1996 s 35(1). As to the application of Pt I (ss 1-84) see PARA 1209.

3 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

4 Arbitration Act 1996 s 35(2).

5 As to statutory arbitrations see PARA 1209 note 7.

6 Arbitration Act 1996 s 96(1), (3). As to the meaning of 'enactment' see PARA 1209 note 6.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(6) DUTIES AND POWERS OF THE ARBITRAL TRIBUNAL AND CONDUCT OF THE ARBITRAL PROCEEDINGS/1250. Default of a party.

1250. Default of a party.

The parties¹ are free to agree on the powers of the arbitral tribunal² in case of a party's failure to do something necessary for the proper and expeditious conduct of the arbitration³. Unless otherwise agreed by the parties⁴, then:

- (1) if the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant⁵ in pursuing his claim and that the delay⁶ gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim⁷, or has caused, or is likely to cause, serious prejudice to the respondent⁸, the tribunal may make an award dismissing the claim⁹;
- (2) if without showing sufficient cause a party¹⁰ fails to attend or be represented at an oral hearing of which due notice¹¹ was given¹², or, where matters are to be dealt with in writing¹³, fails after due notice to submit written evidence or make written submissions¹⁴, the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it¹⁵;
- (3) if without showing sufficient cause a party fails to comply with any order or directions of the tribunal, the tribunal may make a peremptory order¹⁶ to the same effect, prescribing such time for compliance with the order as the tribunal considers appropriate¹⁷;
- (4) if a claimant fails to comply with a peremptory order of the tribunal to provide security for costs¹⁸, the tribunal may make an award dismissing his claim¹⁹;
- (5) if a party fails to comply with any other kind of peremptory order, then, without prejudice to the provisions relating to the enforcement by the court of a tribunal's peremptory orders²⁰, the tribunal may do any of the following²¹:
 6. (a) direct that the party in default is not entitled to rely upon any allegation or material which was the subject matter of the order²²;
 7. (b) draw such adverse inferences from the act of non-compliance as the circumstances justify²³;
 8. (c) proceed to an award on the basis of such materials as have been properly provided to it²⁴;
 9. (d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance²⁵.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

3 Arbitration Act 1996 s 41(1). For the duty of the parties in this respect see PARA 1244. As to the application of Pt I (ss 1-84) see PARA 1209. As to the relationship of the statutory remedies to repudiation by a party of an arbitration agreement see *Elektrim SA v Vivendi Universal SA* [2007] EWHC 11 (Comm), [2007] 2 All ER (Comm) 365, [2007] 1 Lloyd's Rep 693; and PARA 1244 note 2. It has been held that delay cannot repudiate an arbitration agreement: see *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909, [1981] 1 Lloyd's Rep 253, HL; *Frota Oceanica Brasileira SA v Steamship Mutual Underwriting Association (Bermuda) Ltd (The Frostanorte)* [1995] 2 Lloyd's Rep 254 at 263 per Longmore J.

4 Arbitration Act 1996 s 41(2).

5 As to the meaning of 'claimant' see PARA 1221 note 3.

6 Arbitration Act 1996 s 41(3).

7 Arbitration Act 1996 s 41(3)(a).

- 8 Arbitration Act 1996 s 41(3)(b).
- 9 Arbitration Act 1996 s 41(3). As to arbitral awards see PARA 1257 et seq.
- 10 Arbitration Act 1996 s 41(4).
- 11 As to the meaning of 'notice' see PARA 1219 note 7.
- 12 Arbitration Act 1996 s 41(4)(a).
- 13 As to the meaning of 'writing' see PARA 1213 note 4.
- 14 Arbitration Act 1996 s 41(4)(b).
- 15 Arbitration Act 1996 s 41(4).
- 16 'Peremptory order' means an order made under the Arbitration Act 1996 s 41(5) or made in exercise of any corresponding power conferred by the parties: s 82(1). As to the enforcement of peremptory orders see PARA 1252.
- 17 Arbitration Act 1996 s 41(5). As to the reckoning of periods of time see PARA 1221 note 17. As to the power of the court to extend time limits see PARA 1221.
- 18 For the power of the tribunal to order a claimant to provide security for costs see PARA 1248. As to the costs of the arbitration see PARA 1270 et seq.
- 19 Arbitration Act 1996 s 41(6).
- 20 ie under the Arbitration Act 1996 s 42: see PARA 1252.
- 21 Arbitration Act 1996 s 41(7).
- 22 Arbitration Act 1996 s 41(7)(a).
- 23 Arbitration Act 1996 s 41(7)(b).
- 24 Arbitration Act 1996 s 41(7)(c).
- 25 Arbitration Act 1996 s 41(7)(d).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(7) POWERS OF THE COURT IN RELATION TO ARBITRAL PROCEEDINGS/1251. Meaning of 'court' and the jurisdiction of the High Court and county courts.

(7) POWERS OF THE COURT IN RELATION TO ARBITRAL PROCEEDINGS

1251. Meaning of 'court' and the jurisdiction of the High Court and county courts.

For the purposes of the Arbitration Act 1996, 'court' means the High Court¹ or a county court². The Lord Chancellor³ may by order make provision⁴:

- (1) allocating proceedings under the Arbitration Act 1996 to the High Court or to county courts⁵, or specifying proceedings under the Arbitration Act 1996 which may be commenced or taken only in the High Court or in a county court⁶;

(2) requiring proceedings of any specified description under the Arbitration Act 1996 in relation to which a county court has jurisdiction to be commenced or taken in one or more specified county courts⁷.

An order under head (1) or head (2) above may differentiate between categories of proceedings by reference to such criteria as the Lord Chancellor sees fit to specify⁸, and may make such incidental or transitional provision as the Lord Chancellor considers necessary or expedient⁹.

In exercise of these powers the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996¹⁰ has been made, allocating proceedings¹¹. Proceedings under the Arbitration Act 1996 must be commenced and taken in the High Court¹², except that:

- (a) proceedings relating to the stay of legal proceedings¹³ must be commenced in the court in which the legal proceedings are pending¹⁴;
- (b) proceedings relating to the enforcement of awards¹⁵ may be commenced in any county court¹⁶; and
- (c) certain proceedings may be commenced and taken in the Central London County Court Mercantile List¹⁷.

1 As to the meaning of 'High Court' see PARA 1213 note 12.

2 Arbitration Act 1996 s 105(1). As to the meaning of 'county court' see PARA 1213 note 12.

In relation to a judge-arbitrator, or in relation to the appointment of a judge-arbitrator, references in Pt I (ss 1-84) to 'court' are to be construed as references to the Court of Appeal: s 93(6), Sch 2 para 2(1) (which is expressed to be subject to Sch 2 paras 2-14 (see PARAS 1219, 1221, 1236, 1241, 1252-1254, 1261, 1266, 1272, 1274)). As to the appointment of judge-arbitrators see PARA 1226 note 20. As to the meaning of 'Court of Appeal' see PARA 1219 note 7. In the case of a judge-arbitrator, the references in s 32(6) (see PARA 1241), s 45(6) (see PARA 1255), and s 69(8) (see PARA 1278) to the Court of Appeal are to be construed as references to the House of Lords: Sch 2 para 2(2) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 60, to refer to the Supreme Court instead of the House of Lords; at the date at which this volume states the law, no such day had been appointed).

3 As to the Lord Chancellor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq.

4 Arbitration Act 1996 s 105(2). An order must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: see s 105(5).

5 Arbitration Act 1996 s 105(2)(a).

6 Arbitration Act 1996 s 105(2)(b). As to the procedure for arbitration claims see PARA 1283 et seq.

7 Arbitration Act 1996 s 105(3). Any jurisdiction so exercisable by a specified county court is exercisable throughout England and Wales or, as the case may be, Northern Ireland: s 105(3). The Lord Chancellor must consult the Lord Chief Justice of England and Wales or the Lord Chief Justice of Northern Ireland (as the case may be) before making an order under s 105: s 105(3A) (s 105(3)-(3C) added by the Constitutional Reform Act 2005 s 15(1), Sch 4 para 250). The Lord Chief Justice of England and Wales may nominate a judicial office holder (as defined in the Constitutional Reform Act 2005 s 109(4): see **COURTS**) to exercise his functions under the Arbitration Act 1996 s 105: s 105(3B) (as so added). The Lord Chief Justice of Northern Ireland may nominate any of the following to exercise his functions under s 105: (1) the holder of one of the offices listed in the Justice (Northern Ireland) Act 2002 Sch 2; (2) a Lord Justice of Appeal (as defined in s 88 of that Act): Arbitration Act 1996 s 105(3C) (as so added).

8 Arbitration Act 1996 s 105(4)(a).

9 Arbitration Act 1996 s 105(4)(b). The Lord Chancellor's functions under s 105 are protected functions for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

10 Ie the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215: see the text and notes 11-17.

11 See the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, art 1.

12 High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, art 2. The High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, does not prevent the judge in charge of the commercial list (within the meaning of the Supreme Court Act 1981 s 62(3): see **COURTS** vol 10 (Reissue) PARA 615) from transferring proceedings under the Arbitration Act 1996 to another list, court or division of the High Court to which he has power to transfer proceedings; and, where such an order is made, the proceedings may be taken in that list, court or division as the case may be: High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, art 6. As from a day to be appointed, the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(1) (to be brought into force by an order under s 148(1)). At the date at which this volume states the law, no such day had been appointed.

13 le under the Arbitration Act 1996 s 9: see PARA 1222.

14 High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, art 3.

15 le under the Arbitration Act 1996 s 66 or s 101(2): see PARAS 1274, 1290.

16 High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, art 4.

17 See the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, art 5(1) (art 5(1), (2), (3), (4)(d) amended, and art 5(6) added, by SI 2002/439). Where, in exercise of the powers conferred by the County Courts Act 1984 s 41 or s 42 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 69), the High Court or the judge in charge of the Central London County Court Mercantile List orders the transfer of proceedings under the Arbitration Act 1996 which were commenced in the Central London County Court Mercantile List to the High Court, those proceedings must be taken in the High Court: High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, art 5(2) (as so amended). Where, in exercise of its powers under the County Courts Act 1984 s 40(2) (see **CIVIL PROCEDURE** vol 11 (2009) PARA 69), the High Court orders the transfer of proceedings under the Arbitration Act 1996 which were commenced in the High Court to the Central London County Court Mercantile List, those proceedings must be taken in the Central London County Court Mercantile List: High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, art 5(3) (as so amended). In exercising the powers referred to in art 5(2), (3) regard must be had to the following criteria:

- (1) the financial substance of the dispute referred to arbitration, including the value of any claim or counterclaim (art 5(4)(a));
- (2) the nature of the dispute referred to arbitration (eg, whether it arises out of a commercial or business transaction or relates to engineering, building or other construction work) (art 5(4)(b));
- (3) whether the proceedings are otherwise important and, in particular, whether they raise questions of importance to persons who are not parties (art 5(4)(c)); and
- (4) the balance of convenience points to having the proceedings taken in the Central London County Court Mercantile List (art 5(4)(d) (as so amended)).

Where the financial substance of the dispute exceeds £200,000, the proceedings must be taken in the High Court unless the proceedings do not raise questions of general importance to persons who are not parties (art 5(4)). 'Central London County Court Mercantile List' means the Mercantile Court established at the Central London County Court pursuant to the Civil Procedure Rules 1998, SI 1998/3132, Pt 59 (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1545): High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, art 5(6) (as so added).

The value of any claim or counterclaim must be calculated in accordance with the Civil Procedure Rules 1998, SI 1998/3132, r 16.3(6) (see **CIVIL PROCEDURE** vol 11 (2009) PARA 586): High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, art 5(5) (substituted by SI 1999/1010).

UPDATE

1251 Meaning of 'court' and the jurisdiction of the High Court and county courts

NOTES 2, 12--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(7) POWERS OF THE COURT IN RELATION TO ARBITRAL PROCEEDINGS/1252. Power to enforce peremptory orders of the arbitral tribunal.

1252. Power to enforce peremptory orders of the arbitral tribunal.

Unless otherwise agreed by the parties¹, the court² may make an order requiring a party to comply with a peremptory order³ made by the arbitral tribunal⁴. An application for such an order may be made⁵ (1) by the tribunal, upon notice⁶ to the parties⁷; (2) by a party to the arbitral proceedings with the permission of the tribunal, and upon notice to the other parties⁸; or (3) where the parties have agreed that the powers of the court to make such an order are to be available⁹. The court must not act unless it is satisfied that the applicant has exhausted any available arbitral process¹⁰ in respect of failure to comply with the tribunal's order¹¹. No such order may be made unless the court is satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the time prescribed in the order or, if no time was prescribed, within a reasonable time¹². The permission of the court is required for any appeal from its decision¹³.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

Where the arbitral tribunal consists of or includes a judge-arbitrator, the powers of the court under the Arbitration Act 1996 s 42 are exercisable by the High Court and also by the judge-arbitrator himself: s 93(6), Sch 2 para 4(1). Anything done by a judge-arbitrator in the exercise of those powers must be regarded as done by him in his capacity as judge of the High Court and have effect as if done by that court, but this does not prejudice any power vested in him as arbitrator or umpire: Sch 2 para 4(2). As to the meaning of 'High Court' see PARA 1213 note 12.

3 As to the meaning of 'peremptory order' see PARA 1250 note 16.

4 Arbitration Act 1996 s 42(1). As to the application of Pt I (ss 1-84) see PARA 1209. As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

In the context of an adjudication under the Housing Grants, Construction and Regeneration Act 1996 (which, through the statutory scheme of adjudication, provides that the Arbitration Act 1996 s 42(1) applies in respect of peremptory orders made by an adjudicator), an agreement between the parties that the court should not have the power provided for in s 42(1) should be an agreement expressly directed to excluding s 42, and an arbitration agreement simpliciter is not such an agreement: see *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93, 64 ConLR 1.

5 Arbitration Act 1996 s 42(2).

6 As to the meaning of 'upon notice' see PARA 1221 note 7.

7 Arbitration Act 1996 s 42(2)(a).

8 Arbitration Act 1996 s 42(2)(b).

9 Arbitration Act 1996 s 42(2)(c).

10 As to the meaning of 'available arbitral process' see PARA 1221 note 8.

11 Arbitration Act 1996 s 42(3).

12 Arbitration Act 1996 s 42(4).

13 Arbitration Act 1996 s 42(5).

UPDATE

1252 Power to enforce peremptory orders of the arbitral tribunal

NOTE 4--It is not necessary for the court to embark on a review as to whether it is within the defendant's control to do that which it is ordered to do, where the tribunal has reached a clear, firm and reasoned view of the matter: *Emmott v Michael Wilson & Partners Ltd (No 2)* [2009] EWHC 1 (Comm), [2008] 2 All ER (Comm) 856.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(7) POWERS OF THE COURT IN RELATION TO ARBITRAL PROCEEDINGS/1253. Power to secure the attendance of witnesses.

1253. Power to secure the attendance of witnesses.

A party¹ to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings² to secure the attendance before the arbitral tribunal³ of a witness in order to give oral testimony or to produce documents or other material evidence⁴. This may only be done with the permission of the tribunal or the agreement of the other parties⁵. The court procedures may only be used if (1) the witness is in the United Kingdom⁶; and (2) the arbitral proceedings are being conducted in England, Wales or, as the case may be, Northern Ireland⁷.

A party to arbitral proceedings being conducted in England or Wales who wishes to rely on the provision described above to secure the attendance of a witness must apply⁸ for a witness summons⁹. If the attendance of the witness is required within the district of a district registry, the application may be made at that registry¹⁰. A witness summons will not be issued until the applicant files written evidence showing that the application is made with the permission of the tribunal, or the agreement of the other parties¹¹.

A person cannot be compelled to produce any document or other material evidence which he could not be compelled to produce in legal proceedings¹².

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'legal proceedings' see PARA 1213 note 12.

3 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

4 Arbitration Act 1996 s 43(1). The provisions of s 43 are mandatory (see PARA 1211); and the powers conferred by s 43 apply even if the seat of the arbitration is outside England, Wales or Northern Ireland or no seat has been designated or determined, although in certain circumstances the court may refuse to exercise any such power (see s 2(3); and PARA 1209). As to the application of Pt I (ss 1-84) see PARA 1209.

Where the arbitral tribunal consists of or includes a judge-arbitrator, the powers of the court under s 43 are exercisable by the High Court and also by the judge-arbitrator himself: s 93(6), Sch 2 para 4(1). Anything done by a judge-arbitrator in the exercise of those powers must be regarded as done by him in his capacity as judge of the High Court and has effect as if done by that court, but this does not prejudice any power vested in him as arbitrator or umpire: Sch 2 para 4(2). As to the meaning of 'High Court' see PARA 1213 note 12. The court does not have power under s 43 to order third party disclosure in arbitration proceedings: *BNP Paribas v Deloitte & Touche LLP* [2003] EWHC 2874 (Comm), [2004] 1 Lloyd's Rep 233.

For the duty of the tribunal in connection with its decisions on matters of evidence see PARA 1243. For the powers of the tribunal in that connection see PARA 1245.

- 5 Arbitration Act 1996 s 43(2).
- 6 Arbitration Act 1996 s 43(3)(a). As to the meaning of 'United Kingdom' see PARA 1202 note 6.
- 7 Arbitration Act 1996 s 43(3)(b).
- 8 le in accordance with CPR Pt 34: see **CIVIL PROCEDURE** vol 11 (2009) PARA 992 et seq.
- 9 *Practice Direction--Arbitration* PD62 PARA 7.1.
- 10 *Practice Direction--Arbitration* PD62 PARA 7.2. As to district registries of the High Court see **COURTS** vol 10 (Reissue) PARA 646.
- 11 *Practice Direction--Arbitration* PD62 PARA 7.3.
- 12 Arbitration Act 1996 s 43(4).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(7) POWERS OF THE COURT IN RELATION TO ARBITRAL PROCEEDINGS/1254. Powers exercisable in support of arbitral proceedings.

1254. Powers exercisable in support of arbitral proceedings.

Unless otherwise agreed¹ by the parties², the court³ has, for the purposes of and in relation to arbitral proceedings, the same power of making orders about certain matters as it has for the purposes of and in relation to legal proceedings⁴. Those matters are:

- (1) the taking of the evidence of witnesses⁵;
- (2) the preservation of evidence⁶;
- (3) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings⁷;
- 10. (a) for the inspection, photographing, preservation, custody or detention of the property⁸; or
- 11. (b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property⁹,
- and for that purpose authorising any person to enter any premises¹⁰ in the possession or control of a party to the arbitration¹¹;
- (4) the sale of any goods the subject of the proceedings¹²; and
- (5) the granting of an interim injunction or the appointment of a receiver¹³.

If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets¹⁴. If the case is not one of urgency, the court may act only on the application of a party to the arbitral proceedings (upon notice¹⁵ to the other parties and to the arbitral tribunal¹⁶) made with the permission of the tribunal or the agreement in writing¹⁷ of the other parties¹⁸. In any case, the court may act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively¹⁹.

If the court so orders, an order made under these powers will cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject matter of the order²⁰.

The permission of the court is required for any appeal from its decision²¹.

The court may also exercise its powers to make declarations and orders to charge property recovered in the proceedings with the payment of solicitors' costs²² in relation to arbitral proceedings as if those proceedings were proceedings in court²³.

1 See *Re Q's Estate* [1999] 1 All ER (Comm) 499, [1999] 1 Lloyd's Rep 931 (where parties agreed to refer disputes to the 'exclusive jurisdiction' of arbitration they did not, in the absence of more specific words, intend to exclude the court's jurisdiction to grant ancillary relief under the Arbitration Act 1996 s 44).

2 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

3 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

Where the arbitral tribunal consists of or includes a judge-arbitrator, the powers of the court under the Arbitration Act 1996 s 44 are exercisable by the High Court and also by the judge-arbitrator himself: s 93(6), Sch 2 para 4(1). Anything done by a judge-arbitrator in the exercise of those powers must be regarded as done by him in his capacity as judge of the High Court and has effect as if done by that court, but this does not prejudice any power vested in him as arbitrator or umpire: Sch 2 para 4(2). As to the meaning of 'High Court' see PARA 1213 note 12.

4 Arbitration Act 1996 s 44(1). As to the meaning of 'legal proceedings' see PARA 1213 note 12. The powers conferred by s 44 apply even if the seat of the arbitration is outside England, Wales or Northern Ireland or no seat has been designated or determined, although in certain circumstances the court may refuse to exercise any such power: see s 2(3); and PARA 1209. See also *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm), [2008] All ER (D) 310 (Mar) (worldwide freezing order). As to the application of the Arbitration Act 1996 Pt I (ss 1-84) see PARA 1209.

See *Tsako's Shipping and Trading SA v Orizon Tanker Co Ltd, The Centaurus Mar* (27 March 1998, unreported), CA (where a party sought ancillary relief in the form of an order for testing and inspection from the court before a cause of action had arisen the court was cautious about exercising its jurisdiction to make such an order).

By virtue of the Arbitration Act 1996 s 2(3) (see PARA 1209), the powers conferred on the court by s 44 are not confined to making orders in respect of arbitral proceedings whose seat is in England and Wales: *Commerce and Industry Co of Canada v Certain Underwriters at Lloyd's of London* [2002] 2 All ER (Comm) 204, [2002] 1 WLR 1323. There is no justification for an application under the Arbitration Act 1996 s 44 where neither the arbitration nor the parties have any connection with the court's jurisdiction: *Econet Wireless Ltd v VEE Networks Ltd* [2006] EWHC 1568 (Comm), [2006] 2 All ER (Comm) 989.

5 Arbitration Act 1996 s 44(2)(a). The taking of the evidence of witnesses includes making an order for witnesses to attend before an examiner to give evidence for use in foreign arbitral proceedings: *Commerce and Industry Co of Canada v Certain Underwriters at Lloyd's of London* [2002] 2 All ER (Comm) 204, [2002] 1 WLR 1323 (the court declined to use its jurisdiction on the ground inter alia that the purpose of the application was to discover information by witness deposition; the court had no jurisdiction to order a witness to submit to examination merely for the purpose of enabling a party to discover whether that witness's evidence might advance his case).

6 Arbitration Act 1996 s 44(2)(b). The purpose of s 44 is to make available to participants in arbitration proceedings those ancillary powers of the court available in relation to legal proceedings listed at s 44(2)(a)-(e) (see the text to notes 5-13). Those five types of order do not include an order for disclosure by a non-party of documents relevant to an issue in the arbitration. However, the preservation of the contents of certain documents highly likely to contain directly relevant evidence, for the purpose of resolving the issues in the arbitration, justified the exercise of the court's jurisdiction under s 44: *Assimina Maritime Ltd v Pakistan Shipping Corpn, The Tasman Spirit* [2004] EWHC 3005 (Comm), [2005] 1 All ER (Comm) 460, [2005] 1 Lloyd's Rep 525.

7 Arbitration Act 1996 s 44(2)(c).

8 Arbitration Act 1996 s 44(2)(c)(i).

9 Arbitration Act 1996 s 44(2)(c)(ii).

10 'Premises' includes land, buildings, moveable structures, vehicles, vessels, aircraft and hovercraft: Arbitration Act 1996 s 82(1).

11 Arbitration Act 1996 s 44(2)(c).

12 Arbitration Act 1996 s 44(2)(d).

13 Arbitration Act 1996 s 44(2)(e). The court's power under s 44(2)(e) is not limited to cases of urgency; it may take into account s 44(4), (5) and act where the arbitral tribunal is unable to: *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] EWHC 479 (Comm), [2004] 1 All ER (Comm) 753, [2004] 2 Lloyd's Rep 438; *Pacific Maritime (Asia) Ltd v Holystone Overseas Ltd* [2007] EWHC 2319 (Comm), [2008] 1 Lloyd's Rep 371, [2007] All ER (D) 141 (Oct). The power under the Arbitration Act 1996 s 44 may be used to restrain breaches of contract: see *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 2 All ER (Comm) 203, [2005] 2 Lloyd's Rep 494; and PARA 1224 note 6.

If the case is one of urgency, the court only has jurisdiction to make such orders as it thinks necessary for the purpose of preserving evidence or assets: *Cetelem SA v Roust Holdings Ltd*.

14 Arbitration Act 1996 s 44(3). An application for an interim remedy under s 44 must be made in an arbitration claim form: CPR 8.1; and see PARA 1284.

15 As to the meaning of 'upon notice' see PARA 1221 note 7.

16 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

17 As to the meaning of 'writing' see PARA 1213 note 4.

18 Arbitration Act 1996 s 44(4).

19 Arbitration Act 1996 s 44(5). An example would be where a party seeks an order that will have an effect on a third party. The court's power to grant an interim injunction under s 44(5) applies to a case where an arbitral tribunal has yet to be appointed, and an application for an injunction to stop a call on a performance bond comes within s 44(3). In general, when considering whether to make an injunction under s 44, the court should apply the same principles as would have applied had the matter come before it in legal proceedings, rather than adopting the lesser test of maintaining the situation pending the determination of the arbitral tribunal: *Permasteelisa Japan UK v Bouyguesstroi* [2007] All ER (D) 97 (Nov).

20 Arbitration Act 1996 s 44(6).

21 Arbitration Act 1996 s 44(7).

22 Ie under the Solicitors Act 1974 s 73: see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1011.

23 Arbitration Act 1996 s 75. The provisions of s 75 are mandatory: see PARA 1211. The powers of the court to make declarations and orders under the provisions applied by s 75 (see note 22) may be exercised by the judge-arbitrator: s 93(6), Sch 2 para 12.

UPDATE

1254 Powers exercisable in support of arbitral proceedings

NOTE 4--*Mobil*, cited, reported at [2008] 2 All ER (Comm) 1034.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(7) POWERS OF THE COURT IN RELATION TO ARBITRAL PROCEEDINGS/1255. Power to determine a preliminary point of law.

1255. Power to determine a preliminary point of law.

Unless otherwise agreed by the parties¹, the court² may, on the application of a party to arbitral proceedings and upon notice³ to the other parties, determine any question of law⁴ arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties⁵. Such an application must not be considered unless⁶:

- (1) it is made with the agreement of all the other parties to the proceedings⁷; or
- (2) it is made with the permission of the arbitral tribunal⁸ and the court is satisfied⁹ (a) that the determination of the question is likely to produce substantial savings in costs¹⁰; and (b) that the application was made without delay¹¹.

The application must identify the question of law to be determined and, unless made with the agreement of all the other parties to the proceedings, must state the grounds on which it is said that the question should be decided by the court¹². Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while such an application to the court is pending¹³. Unless the court gives permission, no appeal lies from a decision of the court whether the conditions specified in heads (1) and (2) above are met¹⁴. The decision of the court on the question of law is treated as a judgment of the court for the purposes of an appeal, but no appeal lies without the permission of the court, which must not be given unless the court considers that the question is one of general importance, or is one which for some other special reason should be considered by the Court of Appeal¹⁵.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

3 As to the meaning of 'upon notice' see PARA 1221 note 7.

4 As to the meaning of 'question of law' see PARA 1244 note 6.

5 Arbitration Act 1996 s 45(1). As to the application of Pt I (ss 1-84) see PARA 1209. For the duty of the parties, where appropriate, to take steps to obtain a decision of the court on a preliminary question of law see PARA 1244. An agreement to dispense with reasons for the arbitral tribunal's award is considered an agreement to exclude the court's jurisdiction under s 45: s 45(1). The court has the discretion to refuse to determine such a question: *Taylor Woodrow v Barnes & Elliott* [2006] EWHC 1693 (TCC), [2006] 2 All ER (Comm) 735, [2006] BLR 377.

As from a day to be appointed, in the case of a domestic arbitration agreement any agreement to exclude the jurisdiction of the court to determine a preliminary point of law under the Arbitration Act 1996 s 45 is not effective unless entered into after the commencement of the arbitral proceedings in which the question arises or the award is made: s 87(1)(a) (not yet in force). As to the meaning of 'domestic arbitration agreement' see PARA 1213 note 3. For the purposes of s 87 (not yet in force) the question whether an arbitration agreement is a domestic arbitration agreement must be determined by reference to the facts at the time the agreement is entered into: s 87(3) (not yet in force). As to the meaning of 'commencement of the arbitral proceedings' see PARA 1219; definition applied by s 87(2) (not yet in force). Section 87 is to be brought into force by order made by the Secretary of State under s 109(1) as from a day to be appointed. At the date at which this volume states the law no such day had been appointed for the commencement of s 87. As to the power of the Secretary of State to amend the provisions of s 87 see PARA 1213 note 3. As to the Secretary of State see PARA 1209 note 7. As to the abandonment of the distinction between domestic and international arbitration agreements see PARA 1213 note 3.

6 Arbitration Act 1996 s 45(2).

7 Arbitration Act 1996 s 45(2)(a).

8 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

9 Arbitration Act 1996 s 45(2)(b).

10 Arbitration Act 1996 s 45(2)(b)(i). As to the costs of the arbitration see PARA 1270 et seq.

11 Arbitration Act 1996 s 45(2)(b)(ii).

12 Arbitration Act 1996 s 45(3).

13 Arbitration Act 1996 s 45(4).

14 Arbitration Act 1996 s 45(5).

15 Arbitration Act 1996 s 45(6). As to the meaning of 'Court of Appeal' see PARA 1219 note 7. In the case of a judge-arbitrator, the reference in s 45(6) to the Court of Appeal is to be construed as a reference to the House of Lords: s 93(6), Sch 2 para 2(2) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 60, to refer to the Supreme Court instead of the House of Lords; at the date at which this volume states the law, no such day had been appointed).

UPDATE

1255 Power to determine a preliminary point of law

NOTE 15--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(7) POWERS OF THE COURT IN RELATION TO ARBITRAL PROCEEDINGS/1256. Anti-arbitration injunctions.

1256. Anti-arbitration injunctions.

Despite the principle of non-interference in arbitrations¹, in certain circumstances, such as where oppressive and vexatious or unconscionable conduct is proved, the court may grant an injunction restraining the bringing or continuance of foreign arbitration proceedings². This is a similar jurisdiction to that under which foreign proceedings may be restrained by an anti-suit injunction³, but in ordinary cases the caution exercised by the court relating to anti-suit injunctions should be increased or even re-doubled in the case of an anti-arbitration injunction⁴. It has been said that the provisions of the Arbitration Act 1996 point away from the exercise of the court's jurisdiction to grant an anti-arbitration injunction and towards a stay of English proceedings in favour of arbitration⁵. It is therefore only in exceptional circumstances that an anti-arbitration injunction will be granted⁶.

1 See the Arbitration Act 1996 s 1; and PARA 1210.

2 Thus, an injunction has been granted restraining the defendant from pursuing the arbitration pending the resolution of a question as to forgery of a document on the basis that there would be limited scope for the arbitrators to proceed with the arbitration until the authenticity of the document had been decided; that it would be oppressive for the claimant who had limited funds to be required to fight a battle on two fronts; and that it would not be long before the question of authenticity would be decided: *Albon (t/a N A Carriage Co) v Naza Motor Trading Sdn Bhd* [2007] EWCA Civ 1124, [2008] 1 All ER (Comm) 351, [2008] 1 Lloyd's Rep 1.

3 See PARA 1224.

4 *Albon (t/a N A Carriage Co) v Naza Motor Trading Sdn Bhd* [2007] EWCA Civ 1124, [2007] All ER (D) 80 (Nov).

5 See *A v B* [2006] EWHC 2006 (Comm), [2007] 1 All ER (Comm) 591, [2007] 1 Lloyd's Rep 237 (for the English court to interfere with the jurisdiction of a foreign arbitrator in a case such as the instant one to determine the threshold issue of jurisdiction where his award could be challenged in the courts of the seat on grounds of error, lack of independence and bias would not only be contrary to the agreement of the parties as to the seat of arbitration but would also represent a serious judicial invasion of international arbitral territory).

6 See *Elektrim SA v Vivendi Universal SA (No 2)* [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep 8.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(8) THE AWARD/1257. Provisional awards.

(8) THE AWARD

1257. Provisional awards.

The parties¹ are free to agree that the arbitral tribunal² has the power to order on a provisional basis any relief which it would have power to grant in a final award³. This includes, for instance, making a provisional order for the payment of money or the disposition of property as between the parties⁴, or an order to make an interim payment on account of the costs of the arbitration⁵. Any such order is subject to the tribunal's final adjudication, and the tribunal's final award, on the merits or as to costs, must take account of any such order⁶. Unless the parties agree to confer such power on the tribunal, the tribunal has no such power⁷.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

3 Arbitration Act 1996 s 39(1). As to the application of Pt I (ss 1-84) see PARA 1209.

4 Arbitration Act 1996 s 39(2)(a).

5 Arbitration Act 1996 s 39(2)(b). As to the costs of the arbitration see PARA 1270 et seq.

6 Arbitration Act 1996 s 39(3).

7 Arbitration Act 1996 s 39(4). This does not affect the tribunal's powers under s 47 (awards on different issues) (see PARA 1258): s 39(4). The parties may agree that the arbitral tribunal has power to grant a freezing order if under the law of the arbitration it has such a power: see *Kastner v Jason* [2004] EWCA Civ 1599, [2005] 1 Lloyd's Rep 397.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(8) THE AWARD/1258. Awards on different issues.

1258. Awards on different issues.

Unless otherwise agreed by the parties¹, the arbitral tribunal² may make more than one award at different times on different aspects of the matters to be determined³. The tribunal may, in particular, make an award relating to an issue affecting the whole claim⁴, or to a part only of the claims or cross-claims submitted to it for decision⁵. If the tribunal does so, it must specify in its award the issue, or the claim or part of a claim, which is the subject matter of the award⁶.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

3 Arbitration Act 1996 s 47(1). As to the application of Pt I (ss 1-84) see PARA 1209. In its *Report on the Arbitration Bill* (February 1996), the Departmental Advisory Committee on Arbitration Law emphasised that in what is now the Arbitration Act 1996 s 47 it was 'not intending to give arbitral tribunals greater or different powers from those they presently have, but to emphasise how their powers should, in suitable cases, be exercised': *Report on the Arbitration Bill* (February 1996) para 232.

The powers of the tribunal under the Arbitration Act 1996 s 47 are not affected by s 39(4) (in the absence of agreement, the tribunal has no power to make a provisional award): see PARA 1257.

As to the effect of a final award on a partial award see *Republic of Kazakhstan v Istil Group Inc (No 3)* [2007] EWHC 2729 (Comm), [2008] BLR 37.

4 Arbitration Act 1996 s 47(2)(a).

5 Arbitration Act 1996 s 47(2)(b).

6 Arbitration Act 1996 s 47(3).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(8) THE AWARD/1259. Remedies.

1259. Remedies.

The parties¹ are free to agree on the powers exercisable by the arbitral tribunal² as regards remedies³. Unless otherwise agreed by the parties, the tribunal has the following powers⁴:

- (1) it may make a declaration as to any matter to be determined in the proceedings⁵;
- (2) it may order the payment of a sum of money, in any currency⁶;
- (3) it has the same powers as the court⁷ to order⁸ (a) a party to do or refrain from doing anything⁹; (b) specific performance of a contract (other than a contract relating to land)¹⁰; and (c) the rectification, setting aside or cancellation of a deed or other document¹¹.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

3 Arbitration Act 1996 s 48(1). As to the application of Pt I (ss 1-84) see PARA 1209. The power to grant interim freezing orders is not open to all courts and so does not constitute a relevant power of the court for the purposes of s 48: *Kastner v Jason* [2004] EWCA Civ 1599, [2005] 1 Lloyd's Rep 397.

4 Arbitration Act 1996 s 48(2).

5 Arbitration Act 1996 s 48(3).

6 Arbitration Act 1996 s 48(4). As to the duty of the parties to comply with any order or directions of the tribunal see PARA 1244. As to the powers of the tribunal or court in case of a party's default see PARAS 1250, 1252.

In ascertaining loss or expense, an arbitrator should exercise judgment where the facts are not sufficiently clear, and his approach should be the same as for the assessment of damages for breach of contract: *How Engineering Services Ltd v Lindner Ceilings Floor Partitions plc* [1999] 2 All ER (Comm) 374, 64 ConLR 67. As to the measure of damages in contract see **DAMAGES** vol 12(1) (Reissue) PARA 941 et seq. See *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 AC 221, [2005] 3 All ER 789 (tribunal exceeded its powers by expressing award in currencies other than those stipulated for in the contract).

7 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

8 Arbitration Act 1996 s 48(5).

9 Arbitration Act 1996 s 48(5)(a).

10 Arbitration Act 1996 s 48(5)(b). See **SPECIFIC PERFORMANCE**.

11 Arbitration Act 1996 s 48(5)(c). See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 67 et seq.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(8) THE AWARD/1260. Interest.

1260. Interest.

The parties¹ are free to agree on the powers of the arbitral tribunal² as regards the award of interest³. Unless otherwise agreed by the parties, the tribunal may award⁴:

- (1) simple or compound interest from such dates, at such rates, and with such rests, as it considers meets the justice of the case⁵ (a) on the whole or part of any amount awarded by the tribunal⁶, in respect of any period up to the date of the award⁷; (b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings⁸ but paid before the award was made, in respect of any period up to the date of payment⁹;
- (2) simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under head (1) above and any award as to costs)¹⁰.

This does not affect any other power of the tribunal to award interest¹¹.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

3 Arbitration Act 1996 s 49(1). As to the application of Pt I (ss 1-84) see PARA 1209. For the power of the tribunal to make an additional award in respect of any claim (including a claim for interest) which was presented to the tribunal but not dealt with in the award see PARA 1267.

4 Arbitration Act 1996 s 49(2).

5 Arbitration Act 1996 s 49(3). See *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 AC 221, [2005] 3 All ER 789.

6 References to an 'amount awarded by the tribunal' include an amount payable in consequence of a declaratory award by the tribunal: Arbitration Act 1996 s 49(5).

7 Arbitration Act 1996 s 49(3)(a).

8 As to the commencement of arbitral proceedings see PARA 1219.

9 Arbitration Act 1996 s 49(3)(b).

10 Arbitration Act 1996 s 49(4). See *Walker v Rome* [1999] 2 All ER (Comm) 961, [2000] 1 Lloyd's Rep 116 (the court had no power to award post-award interest under the Supreme Court Act 1981 s 35A (see **DAMAGES** vol 12(1) (Reissue) PARA 848) as the power in s 35A is subservient to the specific statutory provision in the Arbitration Act 1996 and the jurisdiction to determine whether to award post-award interest to a successful party lies solely with the tribunal; to award interest under the Supreme Court Act 1981 s 35A would amount to an alteration by the court of the tribunal's award which would be impermissible in the light of the Arbitration Act 1996 s 1(c) (see PARA 1210)). As from a day to be appointed, the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(1) (to be brought into force by an order under s 148(1)). At the date at which this volume states the law, no such day had been appointed.

11 Arbitration Act 1996 s 49(6).

UPDATE

1260 Interest

NOTE 10--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(8) THE AWARD/1261. Extension of time for making the award.

1261. Extension of time for making the award.

Where the time for making an award is limited by or in pursuance of the arbitration agreement¹, then, unless otherwise agreed by the parties², the court³ may by order extend that time⁴. An application for such an order may be made by the arbitral tribunal⁵ (upon notice⁶ to the parties) or by any party to the proceedings (upon notice to the tribunal and the other parties), but only after exhausting any available arbitral process⁷ for obtaining an extension of time⁸. The court may only make an order if satisfied that a substantial injustice would otherwise be done⁹. The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by or under the agreement or by a previous order) has expired¹⁰. The permission of the court is required for any appeal from its decision¹¹.

1 As to the meaning of 'arbitration agreement' see PARA 1213.

2 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

3 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

4 See the Arbitration Act 1996 s 50(1). The power conferred by s 50 is exercisable by a judge-arbitrator: s 93(6), Sch 2 para 5(1). As to the application of Pt I (ss 1-84) see PARA 1209. As to the reckoning of periods of time see PARA 1221 note 17. As to the power of the court to extend time limits generally see PARA 1221.

5 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

6 As to the meaning of 'upon notice' see PARA 1221 note 7.

7 As to the meaning of 'available arbitral process' see PARA 1221 note 8.

8 Arbitration Act 1996 s 50(2).

9 Arbitration Act 1996 s 50(3).

10 Arbitration Act 1996 s 50(4).

11 Arbitration Act 1996 s 50(5). Any appeal from a decision of a judge-arbitrator under s 50 lies to the Court of Appeal with the permission of that court: Sch 2 para 5(2). As to the meaning of 'Court of Appeal' see PARA 1219 note 7.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(8) THE AWARD/1262. Settlement.

1262. Settlement.

If during arbitral proceedings the parties¹ settle the dispute², then, unless otherwise agreed by the parties³, the arbitral tribunal⁴ must terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, must record the settlement in the form of an agreed award⁵. An agreed award must state that it is an award of the tribunal and has the same status and effect as any other award on the merits of the case⁶. Unless the parties have also settled the matter of the payment of the costs of the arbitration, the provisions of Part I of the Arbitration Act 1996 relating to costs⁷ apply⁸.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'dispute' see PARA 1210 note 3.

3 Arbitration Act 1996 s 51(1). As to the application of Pt I (ss 1-84) see PARA 1209.

4 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

5 Arbitration Act 1996 s 51(2). Sections 52-58 relating to awards (see PARA 1263 et seq) are also applicable to an agreed award: s 51(4).

6 Arbitration Act 1996 s 51(3).

7 In the Arbitration Act 1996 ss 59-65: see PARA 1270 et seq.

8 Arbitration Act 1996 s 51(5). As to the costs of the arbitration see PARA 1270 et seq.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(8) THE AWARD/1263. Form of the award.

1263. Form of the award.

The parties¹ are free to agree on the form of an award². If or to the extent that there is no such agreement, the award must³ (1) be in writing⁴ signed by all the arbitrators⁵ or all those assenting to the award⁶; (2) contain the reasons for the award unless it is an agreed award⁷ or the parties have agreed to dispense with reasons⁸; (3) state the seat of the arbitration⁹ and the date when the award is made¹⁰.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 Arbitration Act 1996 s 52(1). Section 52 applies to an agreed award: see PARA 1262. As to the application of Pt I (ss 1-84) see PARA 1209.

A failure by the arbitral tribunal to comply with the requirements as to the form of the award, which the court considers has caused or will cause substantial injustice to the applicant, is a serious irregularity and a ground on which the award may be challenged: see s 68(2)(h); and PARA 1277. As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

3 Arbitration Act 1996 s 52(2).

4 As to the meaning of 'writing' see PARA 1213 note 4.

- 5 As to the meaning of 'arbitrator' see PARA 1219 note 5.
- 6 Arbitration Act 1996 s 52(3).
- 7 As to agreed awards see PARA 1262.
- 8 Arbitration Act 1996 s 52(4).
- 9 As to the meaning of 'seat of the arbitration' see PARA 1212.
- 10 Arbitration Act 1996 s 52(5). As to the date of the award see PARA 1264.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(8) THE AWARD/1264. Place and date of the award.

1264. Place and date of the award.

Unless otherwise agreed by the parties¹, where the seat of the arbitration² is in England, Wales or Northern Ireland, any award in the proceedings must be treated as made there, regardless of where it was signed, despatched or delivered to any of the parties³.

Unless otherwise agreed by the parties, the arbitral tribunal⁴ may decide what is to be taken to be the date on which the award was made⁵, and in the absence of any such decision, the date of the award is taken to be the date on which it is signed by the arbitrator⁶ or, where more than one arbitrator signs the award, by the last of them⁷.

- 1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.
- 2 As to the meaning of 'seat of the arbitration' see PARA 1212.
- 3 Arbitration Act 1996 s 53. Sections 53, 54 (see the text to notes 4-7) apply to an agreed award: see PARA 1262. As to the application of Pt I (ss 1-84) see PARA 1209.
- 4 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.
- 5 Arbitration Act 1996 s 54(1). In the absence of agreement between the parties, the award is to state this date: see PARA 1263.
- 6 As to the meaning of 'arbitrator' see PARA 1219 note 5.
- 7 Arbitration Act 1996 s 54(2).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(8) THE AWARD/1265. Notification of the award.

1265. Notification of the award.

The parties¹ are free to agree on the requirements as to notification of the award to the parties². If there is no such agreement, the award must be notified to the parties by service on them of

copies of the award³, which must be done without delay after the award is made⁴. This does not affect the power to withhold the award in a case of non-payment⁵.

- 1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.
- 2 Arbitration Act 1996 s 55(1). Section 55 applies to an agreed award: see PARA 1262. As to the application of Pt I (ss 1-84) see PARA 1209.
- 3 As to the service of copies of the award see PARA 1219 note 7.
- 4 Arbitration Act 1996 s 55(2).
- 5 Arbitration Act 1996 s 55(3). As to the power of the arbitral tribunal to withhold the award see PARA 1266.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(8) THE AWARD/1266. Power to withhold the award in case of non-payment of fees and expenses.

1266. Power to withhold the award in case of non-payment of fees and expenses.

The arbitral tribunal¹ may refuse to deliver an award to the parties² except upon full payment of the fees and expenses of the arbitrators³. If the tribunal refuses to deliver an award, a party to the arbitral proceedings may (upon notice⁴ to the other parties and the tribunal) apply to the court⁵, which may order that⁶:

- (1) the tribunal must deliver the award on the payment into court by the applicant of the fees and expenses demanded, or such lesser amount as the court may specify⁷;
- (2) the amount of the fees and expenses properly payable⁸ must be determined by such means and upon such terms as the court may direct⁹; and
- (3) out of the money paid into court there must be paid out such fees and expenses as may be found to be properly payable and the balance of the money, if any, must be paid out to the applicant¹⁰.

No application may be made to the court where there is any available arbitral process¹¹ for appeal or review of the amount of the fees or expenses demanded¹². The permission of the court is required for any appeal from its decision¹³.

Similar provisions apply in relation to the withholding of an award for non-payment of the fees and expenses of a judge-arbitrator¹⁴. A judge-arbitrator may refuse to deliver an award except upon payment of the fees and expenses of the arbitrators¹⁵. The judge-arbitrator may, on an application by a party to the arbitral proceedings, order that if the applicant pays into the High Court¹⁶ the fees and expenses demanded, or such lesser amount as the judge-arbitrator may specify, then¹⁷:

- (a) the award must be delivered¹⁸;
- (b) the amount of the fees and expenses properly payable¹⁹ must be determined by such means and upon such terms as the judge-arbitrator may direct²⁰; and
- (c) out of the money paid into court there must be paid out such fees and expenses as may be found to be properly payable and the balance of the money, if any, must be paid out to the applicant²¹.

No such application may be made to the judge-arbitrator²² where there is any available arbitral process for appeal or review of the amount of the fees or expenses demanded²³. Any such appeal from a decision of a judge-arbitrator²⁴ lies to the Court of Appeal²⁵ with the permission of that court²⁶.

1 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

2 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

3 Arbitration Act 1996 s 56(1). References in s 56 to 'arbitrators' include an arbitrator who has ceased to act and an umpire who has not replaced the other arbitrators: s 56(5). As to the meaning of 'arbitrator' generally see PARA 1219 note 5. As to the functions of an umpire see PARA 1230.

The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators: see PARA 1247. As to the joint and several liability of the parties to arbitrators for fees and expenses see PARA 1236.

The provisions of s 56(1)-(5) also apply in relation to any arbitral or other institution or person vested by the parties with powers in relation to the delivery of the tribunal's award: s 56(6). As they so apply, the references to the fees and expenses of the arbitrators are to be construed as including the fees and expenses of that institution or person: s 56(6).

The provisions of s 56 are mandatory (see PARA 1211) and apply to an agreed award (see PARA 1262). As to the application of Pt I (ss 1-84) see PARA 1209.

4 As to the meaning of 'upon notice' see PARA 1221 note 7.

5 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

Where an arbitration claim is made under the Arbitration Act 1996 s 56, each arbitrator must be a defendant: CPR 62.6(1); and see PARA 1286.

6 Arbitration Act 1996 s 56(2).

7 Arbitration Act 1996 s 56(2)(a).

8 For this purpose, the amount of fees and expenses properly payable is the amount the applicant is liable to pay under Arbitration Act 1996 s 28 (see PARA 1236) or any agreement relating to the payment of the arbitrators: ss 56(3), 93(6), Sch 2 para 7(3).

9 Arbitration Act 1996 s 56(2)(b).

10 Arbitration Act 1996 s 56(2)(c).

11 As to the meaning of 'available arbitral process' see PARA 1221 note 8.

12 Arbitration Act 1996 s 56(4). An application for consideration and adjustment of arbitrators' fees and expenses under s 28 (see PARA 1236) where payment has been made to the arbitrators in order to obtain the award is not excluded by s 56: s 56(8).

13 Arbitration Act 1996 s 56(7).

14 See the Arbitration Act 1996 Sch 2 para 6(1). This does not affect the application of s 56 (see the text and notes 1-13) in relation to the delivery of such an award by an arbitral or other institution or person vested by the parties with powers in relation to the delivery of the award: Sch 2 para 6(2).

15 Arbitration Act 1996 Sch 2 para 7(1).

16 As to the meaning of 'High Court' see PARA 1213 note 12.

17 Arbitration Act 1996 Sch 2 para 7(2).

18 Arbitration Act 1996 Sch 2 para 7(2)(a).

19 See note 8.

- 20 Arbitration Act 1996 Sch 2 para 7(2)(b).
- 21 Arbitration Act 1996 Sch 2 para 7(2)(c).
- 22 le under the Arbitration Act 1996 Sch 2 para 7.
- 23 Arbitration Act 1996 Sch 2 para 7(4).
- 24 See note 22.
- 25 As to the meaning of 'Court of Appeal' see PARA 1219 note 7.
- 26 Arbitration Act 1996 Sch 2 para 7(5). Where a party to arbitral proceedings appeals under Sch 2 para 7(5), an arbitrator is entitled to appear and be heard: Sch 2 para 7(6).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(8) THE AWARD/1267. Correction of the award or additional award.

1267. Correction of the award or additional award.

The parties¹ are free to agree on the powers of the arbitral tribunal² to correct an award or make an additional award³. If or to the extent there is no such agreement⁴, the tribunal may on its own initiative or on the application of a party correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award⁵, or make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award⁶. Any application for the exercise of those powers must be made within 28 days of the date of the award⁷ or such longer period as the parties may agree⁸. Any correction of an award must be made within 28 days of the date the application was received by the tribunal or, where the correction is made by the tribunal on its own initiative, within 28 days of the date of the award or, in either case, such longer period as the parties may agree⁹. Any additional award must be made within 56 days of the date of the original award or such longer period as the parties may agree¹⁰. Any correction of an award forms part of the award¹¹.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

3 Arbitration Act 1996 s 57(1). Section 57 applies to an agreed award: see PARA 1262. As to the application of Pt I (ss 1-84) see PARA 1209. As to the application of s 57 see *Sea Trade Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Athena* [2006] EWHC 578 (Comm), [2006] 2 All ER (Comm) 648, [2006] 2 Lloyd's Rep 147.

Any available recourse under the Arbitration Act 1996 s 57 and any available arbitral process of appeal or review must be first exhausted before an application or appeal may be brought under s 67, s 68 or s 69: see s 70(1), (2); and PARA 1279.

4 Arbitration Act 1996 s 57(2).

5 Arbitration Act 1996 s 57(3)(a). These powers must not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal: s 57(3).

See *Gbangbola v Smith & Sherriff Ltd* [1998] 3 All ER 730 (where a party does not seek correction or clarification of an award by the tribunal under the Arbitration Act 1996 s 57, a challenge to the award for serious irregularity based on ambiguity or uncertainty is barred under s 70(2) (see PARA 1279); however, an award may be severed and those parts of it unaffected by decisions on ambiguities or uncertainties may have effect or be

treated as unaffected without any requirement under s 70(2) to have recourse to s 57 before launching an appeal or application); *RC Pillar & Sons v Edwards* [2001] All ER (D) 232 (May) (the effect of one party making an application to the arbitrator under the Arbitration Act 1996 s 57 was such that it was then incumbent on the arbitrator to consider all possible accidental slips, omissions or ambiguities in the award, and it was open to the other party to make submissions as to any such error (whether or not previously identified) without itself making an application under s 57); *Gannet Shipping Ltd v Eastrade Commodities Inc* [2002] 1 All ER (Comm) 297, [2002] 1 Lloyd's Rep 713 (where an arbitrator mistakenly awarded a sum of damages for an element of the claim in respect of which the parties had agreed a lesser sum, such an error constituted an 'accidental slip' and in correcting the error the arbitrator was also entitled to correct the costs award in consequence). See *World Trade Corp'n v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm), [2004] 2 All ER (Comm) 813, [2005] 1 Lloyd's Rep 422.

6 Arbitration Act 1996 s 57(3)(b). For the powers of the tribunal as regards the award of interest or costs see PARAS 1260, 1271. In the Arbitration Act 1996 s 57(3)(b) 'claim' refers to a claim for damages or some other remedy which has been presented to a tribunal but which has not been dealt with, rather than an issue which remains undetermined as part of a claim: *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm), [2004] 2 All ER (Comm) 365, [2004] 2 Lloyd's Rep 446. Where an invalid award is set aside or declared to be of no effect, the jurisdiction of the tribunal is not exhausted with the effect that the tribunal is allowed to make a further award: *Husmann (Europe) Ltd v Pharaon (formerly trading as Al Ameen Development and Trade Establishment)* [2003] EWCA Civ 266, [2003] 1 All ER (Comm) 879.

7 As to the date of the award see PARA 1264. As to the reckoning of periods of time see PARA 1221 note 17. As to the power of the court to extend time limits see PARA 1221.

8 Arbitration Act 1996 s 57(4). The provisions of s 57(4)-(6) do not apply to a judge-arbitrator: s 93(6), Sch 2 para 8. As to the appointment of judge-arbitrators see PARA 1226 note 20.

9 Arbitration Act 1996 s 57(5); and see note 8. See *RC Pillar & Sons v Edwards* [2001] All ER (D) 232 (May) (the court rejected the proposition that the 28-day period under the Arbitration Act 1996 s 57(5) should be calculated from the day the party's application under s 57 actually came to the attention of the tribunal; it should begin with the day on which the relevant document was taken to have arrived at the relevant place for service in accordance with s 76 (see PARA 1219)).

10 Arbitration Act 1996 s 57(6); and see note 8.

11 Arbitration Act 1996 s 57(7).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(8) THE AWARD/1268. Effect of the award.

1268. Effect of the award.

Unless otherwise agreed by the parties¹, an award made by the arbitral tribunal² pursuant to an arbitration agreement³ is final and binding⁴ both on the parties and on any persons claiming through or under them⁵. This does not affect the right of a person to challenge the award by any available arbitral process⁶ of appeal or review or in accordance with the provisions of Part I of the Arbitration Act 1996⁷.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

3 As to the meaning of 'arbitration agreement' see PARA 1213.

4 For the grounds of challenging an award see PARA 1277. As to appeals on questions of law arising out of an award see PARA 1278.

5 Arbitration Act 1996 s 58(1). Section 58 applies to an agreed award: see PARA 1262. As to the application of Pt I (ss 1-84) see PARA 1209. An award does not affect the rights or liabilities of third parties: see eg *Lincoln National Life v Sun Life* [2004] EWCA (Civ) 1660, [2006] 1 All ER (Comm) 675, [2004] All ER (D) 171 (Dec);

Deval Denizelik VE Ticaret AS v Oceantrade Corpn [2007] EWHC 2372 (Comm), [2008] 1 All ER (Comm) 673, [2008] 1 Lloyd's Rep 450 (lien not binding on third party); *Sabah Shipyard (Pakistan) Ltd v Government of Pakistan* [2007] EWHC 2602 (Comm), [2008] 1 Lloyd's Rep 210, [2007] All ER (D) 193 (Nov) (guarantor not bound by arbitration award).

See *Gbangbola v Smith & Sherriff Ltd* [1998] 3 All ER 730 (where an arbitrator had, in an interim award, held that a contractor had not achieved completion by a certain date, it was not open to him in a subsequent award on costs to take into account matters which led him to the conclusion that his earlier decision may have been wrong; under the Arbitration Act 1996 s 58(1) the interim award, not having been challenged, was binding upon the arbitrator as well as the parties).

6 As to the meaning of 'available arbitral process' see PARA 1221 note 8.

7 Arbitration Act 1996 s 58(2).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(8) THE AWARD/1269. Implicit duty of confidentiality and privacy.

1269. Implicit duty of confidentiality and privacy.

The Arbitration Act 1996 does not include express provision covering the issues of confidentiality and privacy in arbitrations¹. As a result, these issues are governed by the common law.

It is implicit in an arbitration agreement that:

- (1) strangers to the agreement should be excluded from the hearing and conduct of the arbitration under the agreement²; and
- (2) the parties must not disclose or use for any other purpose any documents prepared for and used in the arbitration or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award; and they must not disclose in any other way what evidence had been given by any witness in the arbitration³.

There are three qualifications to the obligation under head (2) above, namely:

- (a) such documents may be disclosed with the consent of the other party⁴;
- (b) such documents may be disclosed pursuant to an order or permission of the court⁵;
- (c) the award may be disclosed to a stranger to the arbitration if it is sufficiently necessary to do so in order to enforce or protect the legal rights of a party to the arbitration agreement⁶.

1 See the Departmental Advisory Committee on Arbitration Law *Report on the Arbitration Bill* (February 1996) paras 10-17.

2 *Oxford Shipping Co Ltd v Nippon Yusen Kaisha, The Eastern Saga* [1984] 3 All ER 835, [1984] 2 Lloyd's Rep 373.

3 *Dolling-Baker v Merrett* [1991] 2 All ER 890, [1990] 1 WLR 1205, CA.

4 *Dolling-Baker v Merrett* [1991] 2 All ER 890, [1990] 1 WLR 1205, CA.

5 *Dolling-Baker v Merrett* [1991] 2 All ER 890, [1990] 1 WLR 1205, CA.

6 *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243; *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep 272. This qualification does not extend to the materials underlying the award such as statements of case and witness statements: *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243.

UPDATE

1269 Implicit duty of confidentiality and privacy

NOTES 3-5--The obligation not to disclose is not limited to commercially confidential information in the traditional sense; that is, in reality, a substantive rule of arbitration law reached through the device of an implied term: *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184, [2008] Bus LR 1361, [2008] All ER (D) 162 (Mar).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(9) COSTS OF THE ARBITRATION/1270. Costs of the arbitration.

(9) COSTS OF THE ARBITRATION

1270. Costs of the arbitration.

Any reference in Part I of the Arbitration Act 1996¹ to the 'costs of the arbitration' is to²:

- (1) the arbitrator's³ fees and expenses⁴;
- (2) the fees and expenses of any arbitral institution concerned⁵; and
- (3) the legal or other costs of the parties⁶.

Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration⁷.

An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute⁸ in question has arisen⁹.

1 As to the application of the Arbitration Act 1996 Pt I (ss 1-84) see PARA 1209.

2 Arbitration Act 1996 s 59(1). Unless the parties have settled the matter of the payment of the costs of the arbitration, ss 59, 60 (see the text to notes 8-9) apply to agreed awards: see PARA 1262.

3 As to the meaning of 'arbitrator' see PARA 1219 note 5.

4 Arbitration Act 1996 s 59(1)(a). The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators: see PARA 1247. As to the joint and several liability of the parties to arbitrators for fees and expenses see PARA 1236. As to the power of the tribunal to withhold the award in cases of non-payment of fees and expenses see PARA 1266.

5 Arbitration Act 1996 s 59(1)(b).

6 Arbitration Act 1996 s 59(1)(c). As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

7 Arbitration Act 1996 s 59(2). As to the recoverable costs see PARA 1272. Unless otherwise agreed between the parties, the arbitral tribunal may order a claimant to provide security for the costs of the arbitration: see PARA 1248. For the power of the tribunal to make an order for an interim payment on account of such costs see PARA 1257. For the power of the tribunal to make a preemptory order to provide security for such

costs, and as to the payment of such costs incurred in consequence of non-compliance with such an order, see PARA 1250. As to the award of costs see PARA 1271.

8 As to the meaning of 'dispute' see PARA 1210 note 3.

9 Arbitration Act 1996 s 60. The provisions of s 60 are mandatory: see PARA 1211.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(9) COSTS OF THE ARBITRATION/1271. Award of costs.

1271. Award of costs.

The arbitral tribunal¹ may make an award allocating the costs of the arbitration² as between the parties³, subject to any agreement of the parties⁴. Unless the parties otherwise agree⁵, the tribunal must award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs⁶. Unless the parties otherwise agree, any obligation under an agreement between them as to how the costs of the arbitration are to be borne, or under an award allocating the costs of the arbitration, extends only to such costs as are recoverable⁷.

1 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

2 As to the costs of the arbitration see PARA 1270. As to the power of the tribunal to make an additional award in respect of any claim (including a claim for costs) which was presented to the tribunal but not dealt with in the award see PARA 1267.

3 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

4 Arbitration Act 1996 s 61(1). Unless the parties have settled the matter of the payment of the costs of the arbitration, ss 61, 62 (see the text to note 7) apply to agreed awards: see PARA 1262. As to the application of Pt I (ss 1-84) see PARA 1209.

The tribunal's discretion to award costs under s 61 is subject to the general duty under s 33(1)(a) (see PARA 1243) to act fairly and impartially as between the parties: *Gbangbola v Smith & Sherriff Ltd* [1998] 3 All ER 730.

5 As to the condition for validity of such an agreement see PARA 1270.

6 Arbitration Act 1996 s 61(2).

7 Arbitration Act 1996 s 62. As to the recoverable costs see PARA 1272.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(9) COSTS OF THE ARBITRATION/1272. Recoverable costs, fees and expenses.

1272. Recoverable costs, fees and expenses.

The parties¹ are free to agree what costs of the arbitration² are recoverable³. If or to the extent that there is no such agreement⁴, then the arbitral tribunal⁵ may determine by award the recoverable costs of the arbitration on such basis as it thinks fit⁶. If it does so, it must specify the basis on which it has acted, and the items of recoverable costs and the amount referable to

each⁷. If the tribunal does not determine the recoverable costs of the arbitration, any party to the arbitral proceedings may apply to the court⁸ (upon notice⁹ to the other parties) which may determine the recoverable costs of the arbitration on such basis as it thinks fit, or order that they must be determined by such means and upon such terms as it may specify¹⁰. Unless the tribunal or the court determines otherwise, the recoverable costs of the arbitration must be determined on the basis that there must be allowed a reasonable amount in respect of all costs reasonably incurred, and any doubt as to whether costs were reasonably incurred or were reasonable in amount must be resolved in favour of the paying party¹¹. Any right of the arbitrators¹², or any expert, legal adviser or assessor appointed by the tribunal, or any arbitral institution, to payment of fees and expenses is not affected by the provisions described above¹³.

Unless otherwise agreed by the parties, the recoverable costs of the arbitration include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances¹⁴. If there is any question as to what reasonable fees and expenses are appropriate in the circumstances, and the matter is not already before the court¹⁵, the court may on the application of any party (upon notice to the other parties) determine the matter, or order that it be determined by such means and upon such terms as the court may specify¹⁶. Any right of the arbitrator to payment of his fees and expenses is not affected by the provisions described above¹⁷.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the costs of the arbitration see PARA 1270. As to the award of costs see PARA 1271. For the power to limit recoverable costs see PARA 1273.

3 Arbitration Act 1996 s 63(1). Unless the parties have settled the matter of the payment of the costs of the arbitration, ss 63, 64 (see the text and notes 14-17) apply to agreed awards: see PARA 1262. The provisions of s 63(1)-(5) have effect subject to s 64 (see the text and notes 14-17): s 63(6). As to the application of Pt I (ss 1-84) see PARA 1209.

4 Arbitration Act 1996 s 63(2).

5 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

6 Arbitration Act 1996 s 63(3).

7 Arbitration Act 1996 s 63(3).

8 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

9 As to the meaning of 'upon notice' see PARA 1221 note 7.

10 Arbitration Act 1996 s 63(4). Where the tribunal consists of or includes a judge-arbitrator, the powers of the court under s 63(4) are exercisable by the High Court: s 93(6), Sch 2 para 9. As to the meaning of 'High Court' see PARA 1213 note 12.

For the duty of the parties to comply with any order of the tribunal see PARA 1244. For the powers of the tribunal or the court in case of a party's default see PARAS 1250, 1252.

11 Arbitration Act 1996 s 63(5).

12 As to the meaning of 'arbitrator' see PARA 1219 note 5.

13 See the Arbitration Act 1996 s 63(7). The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators: see PARA 1247. As to the joint and several liability of the parties to arbitrators for fees and expenses see PARA 1236. As to the power of the tribunal to withhold the award in cases of non-payment of fees and expenses see PARA 1266.

14 Arbitration Act 1996 s 64(1). The provisions of s 64(1) have effect subject to any order of the court under s 24(4) (order as to entitlement to fees or expenses in case of removal of arbitrator: see PARA 1233) or s 25(3)(b) (order as to entitlement to fees or expenses in case of resignation of arbitrator: see PARA 1234): s 64(3).

15 le on an application under Arbitration Act 1996 s 63(4): see the text to notes 8-10.

16 Arbitration Act 1996 s 64(2).

17 See the Arbitration Act 1996 s 64(4). The power of the court under s 64 to determine an arbitrator's reasonable fees and expenses may be exercised by a judge-arbitrator: Sch 2 para 10(1). Any exercise of the power is subject to the powers of the Court of Appeal under s 24(4) (directions as to entitlement to fees or expenses in case of removal of arbitrator: see PARA 1233) and s 25(3)(b) (directions as to entitlement to fees or expenses in case of resignation of arbitrator: see PARA 1234): Sch 2 para 10(2). As to the meaning of 'Court of Appeal' see PARA 1219 note 7.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(9) COSTS OF THE ARBITRATION/1273. Limitation of recoverable costs.

1273. Limitation of recoverable costs.

Unless otherwise agreed by the parties¹, the arbitral tribunal² may direct that the recoverable costs of the arbitration³, or of any part of the arbitral proceedings, are to be limited to a specified amount⁴. Any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account⁵.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

3 As to the costs of the arbitration see PARA 1270. As to the recoverable costs see PARA 1272.

4 Arbitration Act 1996 s 65(1). Unless the parties have settled the matter of the payment of the costs of the arbitration, s 65 applies to agreed awards: see PARA 1262. As to the application of Pt I (ss 1-84) see PARA 1209.

As to the duty of the parties to comply with any directions of the tribunal see PARA 1244. As to the powers of the tribunal or court in case of a party's default see PARAS 1250, 1252.

5 Arbitration Act 1996 s 65(2).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(10) ENFORCEMENT OF THE AWARD/1274. Enforcement by the court.

(10) ENFORCEMENT OF THE AWARD

1274. Enforcement by the court.

An award made by the arbitral tribunal¹ pursuant to an arbitration agreement² may, by permission of the court³, be enforced in the same manner as a judgment or order of the court to the same effect⁴. Where permission is given, judgment may be entered in terms of the award⁵. Permission to enforce an award must not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction⁶.

to make the award⁷. The recognition or enforcement of an award under any other enactment⁸ or rule of law is not affected by the provisions described above⁹.

1 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

2 As to the meaning of 'arbitration agreement' see PARA 1213.

3 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

The permission of the court required by the Arbitration Act 1996 s 66 may, in the case of an award of a judge-arbitrator, be given by the judge-arbitrator himself: s 93(6), Sch 2 para 11.

Proceedings under s 66 may be commenced in any county court: High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, art 4; and see PARA 1251.

4 Arbitration Act 1996 s 66(1). The provisions of s 66 are mandatory (see PARA 1211) and apply even if the seat of the arbitration is outside England, Wales or Northern Ireland or no seat has been designated or determined (see s 2(2); and PARA 1209 note 5). As to the application of Pt I (ss 1-84) see PARA 1209. As to the meaning of 'seat of the arbitration' see PARA 1212.

Note that recent cases have drawn a distinction between s 66(1) and s 66(2) (see the text and note 5): *ASM Shipping Ltd of India v TTM Ltd of England (No 2)* [2007] EWHC 927 (Comm), [2007] 2 Lloyd's Rep 155; *ED & F Man Sugar Ltd v Lendoudis* [2007] EWHC 2268 (Comm), [2008] 1 All ER 952, [2007] 2 Lloyd's Rep 579.

In order to be enforceable as a judgment under the Arbitration Act 1996 s 66 the award must be framed in terms which would make sense if they were translated straight into the body of a judgment; however, a foreign award, whether or not made in the English language, will rarely use terms which precisely mirror those which an English court would use for the purpose of drafting a judgment and the award should not be construed in a vacuum: *Tongyuan (USA) International Trading Group v Uni-Clan Ltd* (19 January 2001, unreported); and see *Margulies Bros Ltd v Dafnis Thomaides & Co (UK) Ltd* [1958] 1 Lloyd's Rep 205, CA.

For savings for any rule of law as to the refusal of recognition or enforcement of an arbitral award on grounds of public policy see PARA 1210.

5 Arbitration Act 1996 s 66(2). See note 4. In entering judgment 'in terms of the award', the court may only include post-award interest in the judgment sum if and to the extent that the tribunal expressly provided for such interest in the award: *Walker v Rome* [1999] 2 All ER (Comm) 961, [2000] 1 Lloyd's Rep 116.

6 As to the meaning of 'substantive jurisdiction' see PARA 1239 note 3. As to the power of the tribunal to rule on its own substantive jurisdiction see PARA 1239. As to the raising of an objection that the tribunal lacks substantive jurisdiction see PARA 1240. As to challenging an award of the tribunal in connection with its substantive jurisdiction see PARA 1276.

7 Arbitration Act 1996 s 66(3). The right to raise such an objection may have been lost (see s 73; and PARA 1282): s 66(4). As to security for costs see *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2007] EWCA Civ 988, [2008] 1 All ER (Comm) 209, [2007] 2 Lloyd's Rep 588.

8 As to the meaning of 'enactment' see PARA 1216 note 5.

9 Arbitration Act 1996 s 66(4), which refers in particular to awards under the Arbitration Act 1950 Pt II (ss 35-42) (enforcement of awards under the Geneva Convention) (see PARA 1288) or the Arbitration Act 1996 Pt III (ss 99-104) (recognition and enforcement of awards under the New York Convention or by an action on the award) (see PARAS 1289-1292).

UPDATE

1274 Enforcement by the court

NOTE 4--As to the applicability of the limitation period to applications to enforce an award see *National Ability SA v Tinn Oils & Chemicals Ltd, The Amazon Reefer* [2009] EWCA Civ 1330, [2010] 1 Lloyd's Rep 222, [2009] All ER (D) 109 (Dec) (decided in relation to Arbitration Act 1950 s 26 (repealed)).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(10) ENFORCEMENT OF THE AWARD/1275. Procedure for enforcement of awards.

1275. Procedure for enforcement of awards.

An application for permission¹ to enforce an award in the same manner as a judgment or order may be made without notice in an arbitration claim form². The court may specify parties to the arbitration on whom the arbitration claim form must be served³. The parties on whom the arbitration claim form is served must acknowledge service and the enforcement proceedings will continue as if they were an arbitration claim under the Arbitration Act 1996⁴. With the permission of the court, the arbitration claim form may be served out of the jurisdiction irrespective of where the award is made, or is treated as made⁵.

Where the applicant applies to enforce an agreed award⁶, the arbitration claim form must state that the award is an agreed award, and any order made by the court must also contain such a statement⁷.

An application for permission to enforce an award must be supported by written evidence⁸:

- (1) exhibiting the arbitration agreement and the original award (or copies)⁹;
- (2) stating the name and the usual or last known place of residence or business of the claimant and of the person against whom it is sought to enforce the award¹⁰; and
- (3) stating either that the award has not been complied with, or the extent to which it has not been complied with at the date of the application¹¹.

An order giving permission to enforce an award must be drawn up by the claimant, and must be served on the defendant by delivering a copy to him personally, or sending a copy to him at his usual or last known place of residence or business¹². An order giving permission to enforce an award may be served out of the jurisdiction¹³.

Within 14 days after service of the order or, if the order is to be served out of the jurisdiction, within such other period as the court may set¹⁴ (a) the defendant may apply to set aside the order¹⁵; and (b) the award must not be enforced until after the end of that period, or any application made by the defendant within that period has been finally disposed of¹⁶.

The order must contain a statement of the right to make an application to set the order aside, and the restrictions on enforcement under head (b) above¹⁷.

Where an applicant seeks to enforce an award of interest the whole or any part of which relates to a period after the date of the award, he must file a statement giving the following particulars¹⁸:

- (i) whether simple or compound interest was awarded¹⁹;
- (ii) the date from which interest was awarded²⁰;
- (iii) where rests were provided for, specifying them²¹;
- (iv) the rate of interest awarded²²; and
- (v) a calculation showing the total amount claimed up to the date of the statement, and any sum which will become due on a daily basis²³.

The statement must be filed whenever the amount of interest has to be quantified for the purpose of obtaining a judgment or order²⁴, or enforcing such a judgment or order²⁵.

1 le under the Arbitration Act 1996 s 66: see PARA 1274. As to references to the Arbitration Act 1996 see PARA 1283 note 10.

2 CPR 62.18(1)(a). As to the meaning of 'arbitration claim form' see PARA 1284 note 5. As to the procedure for enforcement of awards under the Arbitration Act 1996 s 101, the Arbitration Act 1950 s 26 (now repealed), or the Arbitration Act 1975 s 3(1)(a) (now repealed) see PARAS 1203, 1292.

The provisions of CPR Pt 62 Section III (rr 62.17-62.21) apply to all arbitration enforcement proceedings other than by a claim on the award: CPR 62.17.

3 CPR 62.18(2).

4 CPR 62.18(3). The enforcement proceedings will continue as if they were an arbitration claim under CPR Pt 62 Section I (rr 62.2-62.10) (claims under the Arbitration Act 1996): see PARAS 1283-1287.

5 CPR 62.18(4).

6 le within the meaning of the Arbitration Act 1996 s 51(2): see PARA 1262.

7 CPR 62.18(5).

8 CPR 62.18(6).

9 See CPR 62.18(6)(a)(i).

10 CPR 62.18(6)(b). Where a body corporate is a party any reference in CPR 62.18 to place of residence or business has effect as if the reference were to the registered or principal address of the body corporate: CPR 62.18(11).

11 CPR 62.18(6)(c).

12 CPR 62.18(7).

13 CPR 62.18(8). It may be served without permission and in accordance with the rules relating to (1) the method of service where a claim form is to be served out of the jurisdiction (see CPR 6.24); (2) service through foreign governments, judicial authorities and British consular authorities (see CPR 6.25-6.26); (3) service in accordance with EC Council Regulation 1348/2000 (OJ L160, 30.06.2000, p 37) on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (see **CIVIL PROCEDURE** vol 11 (2009) PARA 157 et seq) (see CPR 6.26A); (4) service of a claim form on a state (see CPR 6.27); (5) the translation of a claim form (see CPR 6.28); and (6) the undertaking to be responsible for expenses of the Foreign and Commonwealth Office (see CPR 6.29), as if the order were an arbitration claim form: CPR 62.18(8). See **CIVIL PROCEDURE** vol 11 (2009) PARAS 173-179. As to the Foreign and Commonwealth Office see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 459 et seq.

14 CPR 62.18(9).

15 CPR 62.18(9)(a).

16 CPR 62.18(9)(b).

17 CPR 62.18(10).

18 CPR 62.19(1).

19 CPR 62.19(1)(a).

20 CPR 62.19(1)(b).

21 CPR 62.19(1)(c).

22 CPR 62.19(1)(d).

23 CPR 62.19(1)(e).

24 le under the Arbitration Act 1996 s 66: see PARA 1274.

25 CPR 62.19(2).

UPDATE

1275 Procedure for enforcement of awards

NOTE 13--Regulation 1348/2000 repealed and replaced by European Parliament and EC Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (service of documents).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/ (11) CHALLENGING THE AWARD/1276. Challenging the award on the ground of lack of substantive jurisdiction.

(11) CHALLENGING THE AWARD

1276. Challenging the award on the ground of lack of substantive jurisdiction.

A party¹ to arbitral proceedings may (upon notice² to the other parties and to the arbitral tribunal³) apply to the court⁴ challenging any award of the tribunal as to its substantive jurisdiction⁵, or for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction⁶. The tribunal may continue the arbitral proceedings and make a further award while such an application to the court is pending in relation to an award as to jurisdiction⁷. On an application challenging an award of the tribunal as to its substantive jurisdiction, the court may by order confirm the award, vary the award, or set aside the award in whole or in part⁸. The permission of the court is required for any appeal from its decision⁹.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'upon notice' see PARA 1221 note 7.

3 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

4 Arbitration Act 1996 s 67(1). A party may lose the right to object (see s 73; and PARA 1282) and the right to apply is subject to the restrictions in s 70(2), (3) (see PARA 1279): s 67(1). The provisions of s 67 are mandatory: see PARA 1211. As to the application of Pt I (ss 1-84) see PARA 1209.

As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

5 Arbitration Act 1996 s 67(1)(a). See eg *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 1148, [2007] All ER (D) 253 (Nov). As to the meaning of 'substantive jurisdiction' see PARA 1239 note 3.

The court should not be placed in a worse position than the arbitrator in determining a challenge, and it may need to re-hear oral and expert evidence, even if some prejudice is caused by delay and expense: *Azov Shipping Co v Baltic Shipping Co* [1999] 1 All ER 476, [1999] 1 Lloyd's Rep 68.

In refusing permission to an applicant to apply out of time to set aside an award on jurisdiction, it was commented that it would 'be most unfortunate if in a situation of this kind, parties could contest before the arbitrator a question for his jurisdiction and then, on a later application under the Arbitration Act 1996 s 67, seek to introduce a raft of new evidence, causing additional delay to the whole procedure, when they could and should have put it before the arbitrator in the first place': *Ranko Group v Antarctic Maritime SA, The Robin* (12 June 1998, unreported) per Toulson J.

The Arbitration Act 1996 s 67(1)(a) entitles a party to challenge the tribunal's award as to its substantive jurisdiction; but if the parties have reached a separate ad hoc agreement that the tribunal should rule on its substantive jurisdiction, then a challenge under s 67(1)(a) will not normally be available: *LG Caltex Gas Co Ltd v China National Petroleum Corp* [2001] EWCA Civ 788, [2001] 4 All ER 875, [2001] 2 All ER (Comm) 97 (in exceptional circumstances a party will be able to challenge such a ruling where there is a dispute as to the existence of the separate ad hoc agreement). See *Econet Satellite Services Ltd v Vee Networks Ltd* [2006] EWHC 1664 (Comm), [2006] 2 All ER (Comm) 1000, [2006] 2 Lloyd's Rep 423 (arbitrators did not have jurisdiction in respect of defence of transaction set-off where sums owed to defendant were under separate contract).

As to the power of the tribunal to rule on its own substantive jurisdiction see PARA 1239. As to the raising of an objection that the tribunal lacks substantive jurisdiction see PARA 1240.

6 Arbitration Act 1996 s 67(1)(b). A challenge to an arbitral tribunal's jurisdiction takes the form of a rehearing and the question to be answered is whether the tribunal was correct to reach the decision to which it came: *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep 603. Where a tribunal rules that it has no substantive jurisdiction it is axiomatic that it cannot rule on the merits of the dispute and the award may therefore be challenged under the Arbitration Act 1996 s 67(1)(a) (see the text to note 5): *LG Caltex Gas Co Ltd v China National Petroleum Corp* [2001] EWCA Civ 788, [2001] 4 All ER 875, [2001] 2 All ER (Comm) 97. A party wishing to challenge an award on the ground that the arbitration agreement is invalid must explicitly challenge the underlying contract, not the arbitration agreement contained in the arbitration clause: *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm), [2005] 1 All ER (Comm) 303.

The principle of non-justiciability, if it applies, cannot be ousted by consent: *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2006] QB 432, [2006] 2 All ER 225 (arbitration proceedings arising out of bilateral international treaty one of states party to which was one of parties to arbitration; court retained jurisdiction to rule on interpretation of scope of arbitration agreement). See also *Republic of Ecuador v Occidental Exploration and Production Co (No 2)* [2006] EWHC 345 (Comm), [2006] 1 Lloyd's Rep 773.

As to the enforcement of an award (where the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award) see PARA 1274.

Where the tribunal exceeds its powers, otherwise than by exceeding its substantive jurisdiction, there is a serious irregularity which is a ground on which the award may be challenged: see the Arbitration Act 1996 s 68(2)(b); and PARA 1277.

7 Arbitration Act 1996 s 67(2).

8 Arbitration Act 1996 s 67(3).

9 Arbitration Act 1996 s 67(4). 'Court' for these purposes expressly means the court which made the decision against which an appeal is sought: *Athletic Union of Constantinople v National Basketball Association (No 2)* [2002] EWCA Civ 830, [2002] 3 All ER 897. See also *Virdee v Viridi* [2003] All ER (D) 46 (Jan), CA.

UPDATE

1276 Challenging the award on the ground of lack of substantive jurisdiction

NOTE 6--See *Republic of Serbia v Imagesat International NV* [2009] EWHC 2853 (Comm), [2010] 1 Lloyd's Rep 324, [2009] All ER (D) 232 (Nov).

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1277. Challenging the award on the ground of serious irregularity.

A party¹ to arbitral proceedings may (upon notice² to the other parties and to the arbitral tribunal³) apply to the court⁴ challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award⁵. 'Serious irregularity' means an irregularity of one or more of the kinds listed in heads (1) to (9) below which the court considers has caused or will cause substantial injustice to the applicant⁶:

- (1) failure by the tribunal to comply with its general duty⁷;
- (2) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction)⁸;
- (3) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties⁹;
- (4) failure by the tribunal to deal with all the issues that were put to it¹⁰;
- (5) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers¹¹;
- (6) uncertainty or ambiguity as to the effect of the award¹²;
- (7) the award being obtained by fraud, or the award or the way in which it was procured being contrary to public policy¹³;
- (8) failure to comply with the requirements as to the form of the award¹⁴; or
- (9) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award¹⁵.

If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may¹⁶:

- (a) remit the award to the tribunal, in whole or in part, for reconsideration¹⁷;
- (b) set the award aside in whole or in part¹⁸; or
- (c) declare the award to be of no effect, in whole or in part¹⁹.

The court must not exercise its power under head (b) or head (c) above unless it is satisfied that it would be inappropriate to exercise its power under head (a) above²⁰. The permission of the court is required for any appeal from its decision²¹.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 As to the meaning of 'upon notice' see PARA 1221 note 7.

3 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

4 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

5 Arbitration Act 1996 s 68(1). See eg *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 1148, [2007] All ER (D) 253 (Nov). As to the joint hearing of an application challenging an award on the ground of serious irregularity (ie under the Arbitration Act 1996 s 68) and an appeal on a question of law (ie under s 69: see PARA 1278) see *Alphapoint Shipping Ltd v Rotem Amfert Negev Ltd, The Agios Dimitrios* [2004] EWHC 2232 (Comm), [2005] 1 Lloyd's Rep 23; and PARA 1287.

A party may lose the right to object (see the Arbitration Act 1996 s 73; and PARA 1282) and the right to apply is subject to the restrictions in s 70(2), (3) (see PARA 1279): s 68(1). The provisions of s 68 are mandatory: see PARA 1211. As to the application of Pt I (ss 1-84) see PARA 1209.

In its *Report on the Arbitration Bill* (February 1996), the Departmental Advisory Committee on Arbitration Law commented: 'Irregularities stand on a different footing. Here we consider that it is appropriate, indeed essential, that these have to pass the test of causing 'substantial injustice' before the court can act. The court does not have a general supervisory jurisdiction over arbitrations. We have listed the specific cases where a challenge can be made under this clause. The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be

said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, clause 68 [ie what is now the Arbitration Act 1996 s 68] is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected': *Report on the Arbitration Bill* (February 1996) para 280. The court has remarked of the Arbitration Act 1996 s 68 that it 'is no soft option clause as an alternative to a failed application for leave to appeal. Substantial injustice has to be shown before the court will intervene': *Egmatra AG v Marco Trading Corpn* [1999] 1 Lloyd's Rep 862 at 865 per Tuckey J. It is not sufficient for the purposes of the Arbitration Act 1996 s 68 to show that the irregularity has demonstrated incompetence on the part of the arbitrator and has undermined the confidence of the applicant in the ability of the arbitrator: *Conder Structures v Kvaerner Construction Ltd* [1999] ADRLJ 305.

Where a party applies to challenge an award under the Arbitration Act 1996 s 68 on the ground that there are justifiable doubts as to the ability of the tribunal to act impartially, the test to be applied is that which applies under s 24 (see PARA 1233), namely that set out by Lord Goff of Chieveley in *R v Gough* [1993] AC 646, [1992] 4 All ER 481, CA: see *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14 (where arbitrators are appointed under the rules of a trade association, it is assumed that one of the reasons why the parties have agreed to trade arbitration is that they wish to have their dispute decided by people who are themselves active traders, and it is therefore likely that the arbitrators may have had commercial dealings with the parties to the dispute; the parties must be taken to have had this in mind and it does not of itself raise a doubt as to the ability of the arbitrators to act impartially). In an appeal against an arbitral award, the court is not bound by an agreement between the parties that reasons in the arbitral proceedings should be given in private: *Tame Shipping Ltd v Easy Navigation Ltd, The Easy Rider* [2004] EWHC 1862 (Comm), [2004] 2 All ER (Comm) 521, [2004] 2 Lloyd's Rep 626. See also *ABB AG v Hochtief Airport GmbH* [2006] EWHC 388 (Comm), [2006] 1 All ER (Comm) 529, [2006] 2 Lloyd's Rep 1.

6 Arbitration Act 1996 s 68(2). Where a number of irregularities have occurred in an arbitration, the proper approach is to consider their cumulative effect: *Hussman (Europe) Ltd v Al Ameen Development and Trade Co* [2000] 2 Lloyd's Rep 83.

7 Arbitration Act 1996 s 68(2)(a). As to the general duty see s 33; and PARA 1243. It is a serious irregularity for an arbitrator, when exercising his discretion on costs, to rely on points not raised by the parties without first giving them the opportunity to address him on those matters: *Gbangbola v Smith & Sherriff Ltd* [1998] 3 All ER 730. See *Pacol Ltd v Joint Stock Co Rossakhar* [1999] 2 All ER (Comm) 778, [2000] 1 Lloyd's Rep 109 (serious irregularity occurred where the award was made on a basis which the claimants never had a reasonable opportunity of making the subject of their submissions or the subject of evidence); *Apis AS v Fantazia Kereskedelmi KFT* [2001] 1 All ER (Comm) 348 (award challenged on the ground of serious irregularity because one party had not had the opportunity to respond to the other party's evidence); *Hussman (Europe) Ltd v Al Ameen Development and Trade Co* [2000] 2 Lloyd's Rep 83 (failure by the tribunal to seek permission of the parties to discuss an expert's report with him fell below the standards ordinarily to be expected of arbitrators, and the failure to then inform the parties of the meeting was also an irregularity; the irregularities were not found to be serious for the purposes of the Arbitration Act 1996 s 68). See also *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84, [2003] 1 EGLR 1, [2003] 14 EG 124 (arbitrator not acting unfairly by relying on knowledge from within the range of knowledge that would have been expected of him; therefore no serious irregularity occurred); *London Underground Ltd v Citylink Telecommunications Ltd (Note)* [2007] EWHC 1749 (TCC), [2007] 2 All ER (Comm) 694, [2007] BLR 391 (where a claim or a defence has not wholly succeeded and it is necessary to determine what result flows from the partial success or failure, it is a matter of fact or degree in a particular case whether fairness requires the arbitrator to seek further submissions from the parties). See also *Warborough Investments Ltd v S Robinson & Sons (Holdings) Ltd* [2003] EWCA Civ 751, [2004] 2 P & CR 68; *OAO Northern Shipping Co v Remolcadores De Marin SL* [2007] EWHC 1821 (Comm), [2007] 2 Lloyd's Rep 302, [2007] All ER (D) 420 (Jul).

8 Arbitration Act 1996 s 68(2)(b). As to the meaning of 'substantive jurisdiction' see PARA 1239 note 3. As to challenges to substantive jurisdiction see PARA 1276. As to the general powers exercisable by the tribunal see PARA 1248. The making of an error of law by a tribunal does not mean that it has exceeded its powers: *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 AC 221, [2005] 3 All ER 789. See also *Republic of Ecuador v Occidental Exploration and Production Co (No 2)* [2006] EWHC 345 (Comm), [2006] 1 Lloyd's Rep 773; and *Gulf Import and Export Co v Bunge SA* [2007] EWHC 2667 (Comm), [2008] 1 Lloyd's Rep 316, [2007] All ER (D) 320 (Nov).

9 Arbitration Act 1996 s 68(2)(c).

10 Arbitration Act 1996 s 68(2)(d). Section 68(2)(d) is concerned with the failure to deal at all with the case advanced by a party so as to result in substantial injustice; it is not concerned with a failure on the part of the tribunal to arrive at the right answer to an issue: *Weldon Plant Ltd v Commission for the New Towns* [2001] 1 All ER (Comm) 264, 77 ConLR 1. The attribution of weight to different comparables is a matter of judgment for an

arbitrator: *Marklands Ltd v Virgin Retail Ltd* [2003] EWHC 3428 (Ch), [2004] 2 EGLR 43, [2004] 27 EG 130. The issues in question are the important or fundamental issues in the action; there is also a distinction between dealing with an issue and failing to provide reasons for the decision: *Fidelity Management SA v Myriad International Holdings BV* [2005] EWHC 1193 (Comm), [2005] 2 All ER (Comm) 312, [2005] 2 Lloyd's Rep 508.

11 Arbitration Act 1996 s 68(2)(e).

12 Arbitration Act 1996 s 68(2)(f). As to the effect of the award see PARA 1268.

13 Arbitration Act 1996 s 68(2)(g). The words 'obtained by fraud' in s 68(2)(g) must refer to an award being obtained by the fraud of a party to the arbitration or by the fraud of another to which a party to the arbitration was privy; the 'fraud' referred to is not simply a fraud committed by anyone who is connected with the arbitral process: *Elektrim SA v Vivendi Universal SA* [2007] EWHC 11 (Comm), [2007] 2 All ER (Comm) 365, [2007] 1 Lloyd's Rep 693.

Where a party alleges that the way in which an award was procured was contrary to public policy, it will normally be necessary to satisfy the court that some form of reprehensible or unconscionable conduct on the part of the successful party has contributed in a substantial way to an award being made; the court should not be quick to interfere under s 68: *Profilati Italia Srl v PaineWebber Inc* [2001] 1 All ER (Comm) 1065, [2001] 1 Lloyd's Rep 715. It is not a serious irregularity for one party to arbitration proceedings to inadvertently lead the other to believe that no award will be made while negotiations between them continue: *Cuflet Chartering v Carousel Shipping Co Ltd* [2001] 1 All ER (Comm) 398, [2001] 1 Lloyd's Rep 707. A decision may only be challenged on the basis of false evidence where the successful party can be blamed for adducing that evidence and for the deception of the tribunal: *Thyssen Canada Ltd v Mariana Maritime SA, The Mariana* [2005] EWHC 219 (Comm), [2005] 1 Lloyd's Rep 640.

14 Arbitration Act 1996 s 68(2)(h). As to the form of the award see PARA 1263.

15 Arbitration Act 1996 s 68(2)(i). A real possibility of bias on the part of an arbitrator constitutes a serious irregularity causing substantial injustice to the applicant: *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm), [2006] 2 All ER (Comm) 122, [2005] All ER (D) 271 (Nov). See also *Norbrook Laboratories Ltd v A Tank* [2006] EWHC 1055 (Comm), [2006] 2 Lloyd's Rep 485, [2006] BLR 412 (arbitrator initiating direct and unilateral contact with the parties constituted serious irregularity).

16 Arbitration Act 1996 s 68(3).

17 Arbitration Act 1996 s 68(3)(a).

18 Arbitration Act 1996 s 68(3)(b).

19 Arbitration Act 1996 s 68(3)(c).

20 Arbitration Act 1996 s 68(3).

21 Arbitration Act 1996 s 68(4).

UPDATE

1277 Challenging the award on the ground of serious irregularity

NOTE 7--See *F Ltd v M Ltd* [2009] EWHC 275 (TCC), [2009] 2 All ER (Comm) 519 (error by majority because tribunal had not raised new analysis with the parties, and had not asked for submissions on the novel line of reasoning).

NOTE 10--See *Van der Giessen-De-Noord Shipbuilding Division BV v Imtech Marine & Offshore BV* [2008] EWHC 2904 (Comm), [2009] 1 Lloyd's Rep 273, [2008] All ER (D) 284 (Nov) (serious irregularity for tribunal to fail to deal with all essential issues).

1278. Appeal on a question of law.

Unless otherwise agreed by the parties¹, a party to arbitral proceedings may (upon notice² to the other parties and to the arbitral tribunal³) appeal to the court⁴ on a question of law⁵ arising out of an award made in the proceedings⁶. An appeal must not be brought except with the agreement of all the other parties to the proceedings, or with the permission of the court⁷. Permission to appeal must be given only if the court is satisfied⁸:

- (1) that the determination of the question will substantially affect the rights of one or more of the parties⁹;
- (2) that the question is one which the tribunal was asked to determine¹⁰;
- (3) that, on the basis of the findings of fact in the award, either the decision of the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt¹¹; and
- (4) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question¹².

An application for permission to appeal must identify the question of law to be determined and state the grounds on which it is alleged that permission to appeal should be granted¹³. The court must determine an application for permission to appeal without a hearing unless it appears to the court that a hearing is required¹⁴.

On an appeal the court may by order¹⁵:

- (a) confirm the award¹⁶;
- (b) vary the award¹⁷;
- (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination¹⁸; or
- (d) set aside the award in whole or in part¹⁹.

An award may be upheld on alternative grounds on appeal²⁰.

The decision of the court on an appeal is treated as a judgment of the court for the purposes of a further appeal, but no such appeal lies without the permission of the court, which must not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal²¹.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

As from a day to be appointed, in the case of a domestic arbitration agreement any agreement to exclude the jurisdiction of the court to determine an appeal on a point of law under the Arbitration Act 1996 s 69 is not effective unless entered into after the commencement of the arbitral proceedings in which the question arises or the award is made: s 87(1)(b) (not yet in force). As to the meaning of 'domestic arbitration agreement' see PARA 1213 note 3. For the purposes of s 87 (not yet in force), the question whether an arbitration agreement is a domestic arbitration agreement must be determined by reference to the facts at the time the agreement is entered into: s 87(3) (not yet in force). As to the meaning of 'commencement of the arbitral proceedings' see PARA 1219; definition applied by s 87(2) (not yet in force). Section 87 is to be brought into force by order made by the Secretary of State under s 109(1) as from a day to be appointed. At the date at which this volume states the law no such day had been appointed for the commencement of s 87. As to the power of the Secretary of State to amend the provisions of s 87 see PARA 1213 note 3. As to the Secretary of State see PARA 1209 note 7. As to the abandonment of the distinction between domestic and international arbitration agreements see PARA 1213 note 3.

2 As to the meaning of 'upon notice' see PARA 1221 note 7.

3 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

4 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20. See also note 20.

5 As to the meaning of 'question of law' see PARA 1244 note 6. See *Reliance Industries Ltd v Enron Oil and Gas India Ltd* [2002] 1 All ER (Comm) 59, [2002] 1 Lloyd's Rep 645 (where the substantive law of the contracts in dispute was Indian law, the fact that the parties had agreed that the principles of construction of contracts in Indian law were the same as in English law did not mean that a party could appeal under the Arbitration Act 1996 s 69). As to the determination of a preliminary point of law see PARA 1255.

6 Arbitration Act 1996 s 69(1). As to the joint hearing of an application challenging an award on the ground of serious irregularity (ie under s 68: see PARA 1277) and an appeal on a question of law (ie under s 69) see *Alphapoint Shipping Ltd v Rotem Amfert Negev Ltd, The Agios Dimitrios* [2004] EWHC 2232 (Comm), [2005] 1 Lloyd's Rep 23; and PARA 1287. As to the application of Pt I (ss 1-84) see PARA 1209.

An agreement to dispense with reasons for the tribunal's award is considered an agreement to exclude the court's jurisdiction under the Arbitration Act 1996 s 69: s 69(1). As to the evidence that should be considered in an appeal under s 69 and the court's approach to the arbitrator's decision see *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] EWHC 727 (TCC), [2006] 4 All ER 79, [2006] 2 All ER (Comm) 81. See also *Demco Investments and Commercial SA v SE Banken Forsakring Holding Aktiebolag* [2005] EWHC 1398 (Comm), [2005] 2 Lloyd's Rep 650. The Court of Appeal has jurisdiction to determine an appeal as to the validity of an exclusion agreement: *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 243, [2007] 3 All ER 342, [2007] 2 Lloyd's Rep 87.

7 Arbitration Act 1996 s 69(2). See further *Royal and Sun Alliance Insurance plc v BAE Systems (Operations) Ltd* [2008] EWHC 743, (Comm), [2008] All ER (D) 189 (Apr). The right to appeal is subject to the restrictions in the Arbitration Act 1996 s 70(2), (3) (see PARA 1279): s 69(2). There is no policy reason why consent to the court exercising its jurisdiction should be restricted to consent given after the dispute has been referred to arbitration; if the parties to arbitration have agreed in advance, eg by the wording of their arbitration agreement, that there should be mutual consent to appeals from any award without permission, such an agreement may be enforced: *Poseidon Schifffahrt GmbH v Nomadic Navigation Co Ltd* [1999] 1 All ER (Comm) 454, [1999] 1 Lloyd's Rep 723, CA.

8 Arbitration Act 1996 s 69(3). See *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS Northern Pioneer Schifffahrtsgesellschaft mbH & Co* [2002] EWCA Civ 1878, [2003] 1 All ER (Comm) 204, [2003] 1 Lloyd's Rep 212.

A judge has a duty, by virtue of the right to a fair hearing under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 6, to inform a successful applicant, at the very least, which test contained in the Arbitration Act 1996 s 69(3) his application fails to satisfy: *North Range Shipping Ltd v Seatrans Shipping Corpn, The Western Triumph* [2002] EWCA Civ 405, [2002] 2 All ER (Comm) 193, [2002] 2 Lloyd's Rep 1. See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 122 et seq.

The permission of the court is required for any appeal from a decision of the court under the Arbitration Act 1996 s 69 to grant or refuse permission to appeal: s 69(6). However, the Court of Appeal has jurisdiction to determine the question whether there is an exclusion agreement despite the refusal of permission to appeal by the judge at first instance: *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 243, [2007] 3 All ER 342, [2007] 2 Lloyd's Rep 87.

9 Arbitration Act 1996 s 69(3)(a).

10 Arbitration Act 1996 s 69(3)(b). See *Marklands Ltd v Virgin Retail Ltd* [2003] EWHC 3428 (Ch), [2004] 2 EGLR 43, [2004] 27 EG 130 (failure by arbitrator to consider hypothetical factual inquiry as to value of lease).

11 Arbitration Act 1996 s 69(3)(c). A ground of challenge that there was no satisfactory evidence on a particular point is not available under s 69; the findings of fact made by the arbitrator are taken as being the accepted basis for the appeal under s 69(3)(c) and the admissibility, relevance or weight of any material is a matter wholly for the arbitrator under s 34(2)(f): *London Underground Ltd v Citylink Telecommunications Ltd (Note)* [2007] EWHC 1749 (TCC), [2007] 2 All ER (Comm) 694, [2007] BLR 391.

12 Arbitration Act 1996 s 69(3)(d).

13 Arbitration Act 1996 s 69(4).

14 Arbitration Act 1996 s 69(5). Once an application for permission to appeal has been determined pursuant to s 69(5) on the papers, it cannot then also be determined at an oral hearing: *BLCT (13096) Ltd v J Sainsbury plc* [2003] EWCA Civ 884, [2004] 2 P & CR 32.

15 Arbitration Act 1996 s 69(7).

16 Arbitration Act 1996 s 69(7)(a).

17 Arbitration Act 1996 s 69(7)(b).

18 Arbitration Act 1996 s 69(7)(c). The mere fact that no request was made for a ruling on a contingent basis did not make it inappropriate for the matter to be remitted following a successful application under s 69: see *Marc Rich Agriculture Trading SA v Agrimex Ltd* [2000] 1 All ER (Comm) 951.

19 Arbitration Act 1996 s 69(7)(d). The court must not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration: s 69(7). See note 18.

20 See *CTI Group Inc v Transclear SA (No 2)* [2007] EWHC 2340 (Comm), [2008] 1 All ER (Comm) 203, [2008] 1 Lloyd's Rep 250.

21 Arbitration Act 1996 s 69(8). As to the meaning of 'Court of Appeal' see PARA 1219 note 7. In the case of a judge-arbitrator, the reference in s 69(8) to the Court of Appeal is to be construed as a reference to the House of Lords: s 93(6), Sch 2 para 2(2) (amended, as from a day to be appointed, by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 60, to refer to the Supreme Court instead of the House of Lords; at the date at which this volume states the law, no such day had been appointed).

The Arbitration Act 1996 s 69(8) has not been affected by the Access to Justice Act 1999 s 55: *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] QB 388, [2001] 1 All ER 257, [2000] 2 All ER (Comm) 960, CA. The effect of the Arbitration Act 1996 s 69(8) is that an appeal from a decision of a county court or the High Court made under s 69 will only lie to the Court of Appeal with the permission of those lower courts, and it is not open to the Court of Appeal to conduct a review of the lower court's refusal to grant permission: *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] QB 388, [2001] 1 All ER 257, [2000] 2 All ER (Comm) 960, CA. The Supreme Court Act 1981 s 18 has been amended to provide that no appeal from any decision of the High Court under the Arbitration Act 1996 Pt I may lie to the Court of Appeal except as provided by Pt I: see the Supreme Court Act 1981 s 18(1)(g) (substituted by the Arbitration Act 1996 s 107(1), Sch 3 para 37(2)). This should be read as meaning 'from any decision of the High Court under a section in that Part which provides for an appeal from such decision': *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109 at 115, [2000] 1 WLR 586 at 592, HL, per Lord Nicholls of Birkenhead. As to the meaning of 'High Court' see PARA 1213 note 12. As from a day to be appointed, the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(1) (to be brought into force by an order under s 148(1)). At the date at which this volume states the law, no such day had been appointed.

The Court of Appeal retains a residual jurisdiction to review the misconduct or unfairness of a first instance judge's determination concerning the grant or refusal of leave to appeal: *CGU International Insurance plc v AstraZeneca Insurance Co Ltd* [2006] EWCA Civ 1340, [2007] 1 All ER (Comm) 501, [2007] 1 Lloyd's Rep 142.

UPDATE

1278 Appeal on a question of law

NOTE 6--Leave to appeal granted under the 1996 Act s 69 does not bind the appeal court to accept that a question of law has arisen for decision: *Owners of the Vessel 'Ocean Crown' v Five Oceans Salvage Consultants Ltd* [2009] EWHC 3040 (Admlty), [2010] 1 Lloyd's Rep 468, [2009] All ER (D) 296 (Nov). See also *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm), (2010) 127 ConLR 27.

NOTE 21--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/ (11) CHALLENGING THE AWARD/1279. Challenge or appeal generally.

1279. Challenge or appeal generally.

An application to challenge an award on the grounds of lack of substantive jurisdiction or serious irregularity or an appeal on a question of law¹ may not be brought if the applicant or appellant has not first exhausted any available arbitral process² of appeal or review, and any available recourse for the correction of an award and additional awards³. Any application or appeal must be brought within 28 days⁴ of the date of the award⁵ or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process⁶.

If on an application or appeal it appears to the court⁷ that the award does not contain the arbitral tribunal's⁸ reasons, or does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose⁹.

The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with¹⁰. The power to order security for costs must not be exercised on the ground that the applicant or appellant is an individual ordinarily resident outside the United Kingdom¹¹, or a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom¹². The court may order that any money payable under the award must be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with¹³. The court may grant permission to appeal subject to conditions to the same or similar effect¹⁴.

1 Ie an application or appeal under the Arbitration Act 1996 ss 67-69 (see PARAS 1276-1278): s 70(1). As to the joint hearing of an application challenging an award on the ground of serious irregularity (ie under s 68: see PARA 1277) and an appeal on a question of law (ie under s 69: see PARA 1278) see *Alphapoint Shipping Ltd v Rotem Amfert Negev Ltd, The Agios Dimitrios* [2004] EWHC 2232 (Comm), [2005] 1 Lloyd's Rep 23; and PARA 1287. The Arbitration Act 1996 s 70 (so far as relating to ss 67, 68) has effect notwithstanding any agreement to the contrary: see PARA 1211. As to the application of Pt I (ss 1-84) see PARA 1209.

2 As to the meaning of 'available arbitral process' see PARA 1221 note 8.

3 See the Arbitration Act 1996 s 70(2). The text refers to any available recourse under s 57: see PARA 1267. See *Gbangbola v Smith & Sherriff Ltd* [1998] 3 All ER 730 (where a party does not seek correction or clarification of an award by the tribunal under the Arbitration Act 1996 s 57, a challenge to the award for serious irregularity based on ambiguity or uncertainty is barred under s 70(2); however, an award may be severed and those parts of it unaffected by decisions on ambiguities or uncertainties may have effect or be treated as unaffected without any requirement under s 70(2) to have recourse to s 57 before launching an appeal or application). See also *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm), [2004] 2 All ER (Comm) 365, [2004] 2 Lloyd's Rep 446 (where claimants have not exhausted the recourse available to them under the Arbitration Act 1996 s 57, s 70 amounts to an insurmountable bar).

The Arbitration Act 1996 s 70(2) does not apply in the case of a person who challenges an award in accordance with s 72(2): see PARA 1281.

4 References in the Arbitration Act 1996 Pt I to making an application or appeal to the court within a specified period are to the issue within that period of the appropriate originating process in accordance with rules of court: s 80(4). Where any provision of Pt I requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement: s 80(5). Rules of court amending Pt I may make provision (1) with respect to the time within which any application or appeal to the court must be made (s 80(6)(a)); (2) so as to keep any provision made by Pt I in relation to arbitral proceedings in step with the corresponding provision of rules of court applying in relation to proceedings in the court (s 80(6)(b)); or (3) so as to keep any provision made by Pt I in relation to

legal proceedings in step with the corresponding provision of rules of court applying generally in relation to proceedings in the court (s 80(6)(c)). The provisions of s 80 do not affect the generality of the power to make rules of court: s 80(7). As to the meaning of 'rules of court' see PARA 1221 note 7. As to the meaning of 'legal proceedings' see PARA 1213 note 12. As to the reckoning of periods of time see PARA 1221 note 17. As to the power of the court to extend time limits see PARA 1221.

The effect of s 80(5) is to introduce a broad discretionary approach into applications for the extension of the 28-day time limit under the Arbitration Act 1996 s 67 (see PARA 1276), s 68 (see PARA 1277), and s 69 (see PARA 1278): *Kalmneft JSC v Glencore International AG* [2002] 1 All ER 76, [2001] 2 All ER (Comm) 577. The material considerations likely to be taken into account by the court when determining an application for extension of time are (a) the length of the delay; (b) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances; (c) whether the respondent to the application or the arbitrator caused or contributed to the delay; (d) whether the respondent to the application would by reason of the delay suffer irreparable prejudice in addition to the mere loss of time if the application were permitted to proceed; (e) whether the arbitration had continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred the determination of the application by the court might now have; (f) the strength of the application; and (g) whether it would be unfair to the applicant for him to be denied the opportunity of having the application determined: *Kalmneft JSC v Glencore International AG* [2002] 1 All ER 76, [2001] 2 All ER (Comm) 577.

Provision has been made by CPR Pt 62 for the court to vary the period of 28 days fixed by the Arbitration Act 1996 s 70(3) for challenging the award under s 67 (see PARA 1276) or s 68 (see PARA 1277), and appealing against an award under s 69 (see PARA 1278): see CPR 62.9(1). Before the period of 28 days has expired an application for such an order must be made in a CPR Part 23 application notice (see *Practice Direction--Arbitration* PD62 para 11.1(1)), and it may be made without notice being served on any other party (see CPR 62.9(2)). After the period of 28 days has expired (i) an application for such an order must be made in the arbitration claim form, and it must state the grounds on which the application is made (CPR 62.9(3)(a); *Practice Direction--Arbitration* PD62 para 11.1(2)); (ii) any defendant may file written evidence opposing the extension of time within seven days after service of the arbitration claim form (CPR 62.9(3)(b)); and (iii) if the court extends the period of 28 days, each defendant's time for acknowledging service and serving evidence starts to run as if the arbitration claim form had been served on the date when the court's order is served on that defendant (CPR 62.9(3)(c)). As to CPR Pt 23 see **CIVIL PROCEDURE** vol 11 (2009) PARA 303 et seq. The court will generally decide whether to extend the time limit under the Arbitration Act 1996 s 70(3) without a hearing: *Practice Direction--Arbitration* PD62 para 10.2; and see PARA 1287.

5 As to the date of the award see PARA 1264. As to whether the time for an appeal under the Arbitration Act 1996 ss 67-69 runs from the date of the award or, where the award has been amended (see PARA 1267), the date of the amended award see *RC Pillar & Sons v Edwards* [2001] All ER (D) 232 (May); but cf *Blackdale Ltd v McLean Homes South East Ltd* [2001] All ER (D) 55 (Nov); *Al Hadha Trading Co v Tradigrain SA* [2002] 2 Lloyd's Rep 512.

6 Arbitration Act 1996 s 70(3). The court has no jurisdiction under s 79(1) (see PARA 1221) to extend the 28-day time limit for bringing an application or appeal against an award under s 70(3), because it is neither a time limit agreed by the parties nor a time limit specified in Pt I as having effect in default of such agreement; however, the court has jurisdiction to extend time pursuant to s 80(5) and the rules of court (see note 4): see the Departmental Advisory Committee on Arbitration Law *Report on the Arbitration Bill* (February 1996) para 382; the Departmental Advisory Committee on Arbitration Law *Supplementary Report on the Arbitration Act 1996* (January 1997) para 41; and *Ranko Group v Antarctic Maritime SA, The Robin* (12 June 1998, unreported); *RC Pillar & Sons v Edwards* [2001] All ER (D) 232 (May). See also *Advance Specialist Treatment Engineering Ltd v Cleveland Structural Engineering (Hong Kong) Ltd (Practice Note)* [2000] 2 All ER (Comm) 189, [2000] 1 WLR 558 (where time for applying for permission to appeal against an award had expired, but time for service of such an application had not expired, the successful party in the arbitration was entitled to ascertain whether an arbitration claim form had been filed in the Commercial Court Registry, pursuant to CPR 5.4(1); alternatively, the court would exercise its discretion to allow the successful party to search for, inspect and copy any arbitration claim form which had been filed, pursuant to CPR 5.4(2)(c)). See **CIVIL PROCEDURE** vol 11 (2009) PARA 82.

7 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

8 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

9 Arbitration Act 1996 s 70(4). Where the court makes an order under s 70(4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order: s 70(5). As to the costs of the arbitration see PARA 1270 et seq.

10 Arbitration Act 1996 s 70(6). In exercising its discretion under s 70(6), the court must act justly in accordance with CPR 1.1: see *Republic of Kazakhstan v Istil Group Inc* [2005] EWCA Civ 1468, [2006] 2 All ER (Comm) 26, [2006] 1 WLR 596; and **CIVIL PROCEDURE** vol 11 (2009) PARA 746.

11 Arbitration Act 1996 s 70(6)(a). As to the meaning of 'United Kingdom' see PARA 1202 note 6. On an application under s 70(6) for security for costs in relation to an application under s 67 (see PARA 1276), the discretion of the court is unfettered save to the extent specified in s 70(6)(a) and s 70(6)(b) (see the text to note 12).

12 Arbitration Act 1996 s 70(6)(b). See note 11. A party would not normally be ordered to provide security for costs where it appears that the applicant has sufficient assets to meet any order for costs and if those assets are available for satisfaction of any such order: *Azov Shipping Co v Baltic Shipping Co (No 2)* [1999] 1 All ER (Comm) 716, [1999] 2 Lloyd's Rep 39 (the existence of an arbitral award on the subject matter of the application under the Arbitration Act 1996 s 67 was a relevant consideration (although less weight was to be given to its existence) especially if no cogent reason was put forward for saying that the award was wrong).

13 Arbitration Act 1996 s 70(7).

14 Arbitration Act 1996 s 70(8). This does not affect the general discretion of the court to grant permission subject to conditions: s 70(8).

UPDATE

1279 Challenge or appeal generally

NOTE 4--See *L Brown and Sons Ltd v Crosby Homes (North West) Ltd* [2008] EWHC 817 (TCC), [2008] BLR 366, [2008] All ER (D) 315 (Apr).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/ (11) CHALLENGING THE AWARD/1280. Effect of an order of court on a challenge or appeal.

1280. Effect of an order of court on a challenge or appeal.

Where the court¹ makes an order with respect to an award on an application to challenge an award on the grounds of lack of substantive jurisdiction or serious irregularity or an appeal on a question of law², and the award is varied, the variation has effect as part of the arbitral tribunal's award³. Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal must make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct⁴. Where the award is set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings⁵ in respect of a matter to which the arbitration agreement⁶ applies, is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award⁷.

1 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

2 Ie an order under the Arbitration Act 1996 ss 67-69 (see PARAS 1276-1278): s 71(1). Section 71 (so far as relating to ss 67, 68) has effect notwithstanding any agreement to the contrary: see PARA 1211. As to the application of Pt I (ss 1-84) see PARA 1209.

3 See the Arbitration Act 1996 s 71(2). As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

4 Arbitration Act 1996 s 71(3). As to the reckoning of periods of time see PARA 1221 note 17. As to the power of the court to extend time limits see PARA 1221. When an award is remitted for a specific purpose, the arbitrator may not amend it in any other way and the award is otherwise valid: *Carter (t/a Michael Carter*

Partnership) v Harold Simpson Associates (Architects) Ltd [2004] UKPC 29, [2005] 1 WLR 919, [2004] 2 Lloyd's Rep 512.

5 As to the meaning of 'legal proceedings' see PARA 1213 note 12.

6 As to the meaning of 'arbitration agreement' see PARA 1213.

7 Arbitration Act 1996 s 71(4). Section 71(4) does not apply in relation to a statutory arbitration: see s 97(c); and PARA 1209 note 7.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/ (11) CHALLENGING THE AWARD/1281. Rights of a person who takes no part in proceedings.

1281. Rights of a person who takes no part in proceedings.

A person alleged to be a party¹ to arbitral proceedings but who takes no part in the proceedings may question²:

- (1) whether there is a valid arbitration agreement³;
- (2) whether the arbitral tribunal⁴ is properly constituted⁵; or
- (3) what matters have been submitted to arbitration in accordance with the arbitration agreement⁶,

by proceedings in the court⁷ for a declaration or injunction or other appropriate relief⁸. He also has the same right as a party to the arbitral proceedings to challenge an award⁹ by an application¹⁰ on the ground of lack of substantive jurisdiction¹¹ in relation to him¹², or by an application¹³ on the ground of serious irregularity¹⁴ affecting him¹⁵; and the duty to exhaust arbitral procedures¹⁶ does not apply in his case¹⁷.

1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.

2 Arbitration Act 1996 s 72(1). The provisions of s 72 are mandatory: see PARA 1211. As to the application of Pt I (ss 1-84) see PARA 1209.

3 Arbitration Act 1996 s 72(1)(a). As to the meaning of 'arbitration agreement' see PARA 1213. As to arbitration agreements see PARA 1213 et seq.

4 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.

5 Arbitration Act 1996 s 72(1)(b). As to the constitution of the tribunal see PARA 1226 et seq.

6 Arbitration Act 1996 s 72(1)(c). See *Tamil Nadu Electricity Board v St-CMS Electric Co Pvt Ltd* [2007] EWHC 1713 (Comm), [2007] 2 All ER (Comm) 701, [2008] 1 Lloyd's Rep 93.

7 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

8 Arbitration Act 1996 s 72(1). As to injunctions generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq. The basis of the challenge under s 72 is that the objecting person is not a party to what are ostensibly arbitration proceedings because those proceedings are not actually proceedings which can be asserted against him. It is in that sense that the word 'alleged' is used. Section 72(1) could usefully be read as if it repeated the word 'alleged' before the expression 'arbitral proceedings': see *Law Debenture Trust Corp v Elektrim Finance BV* [2005] EWHC 1412 (Ch), [2005] 2 All ER (Comm) 476, [2005] 2 Lloyd's Rep 755. As to the limited application of the Arbitration Act 1996 s 72 see *Fiona Trust and Holding Corp v Privalov* [2007] EWCA Civ 20, [2007] 1 All ER (Comm) 891; affd [2007] UKHL 40, [2007] 4 All ER 951, [2007] 1 Lloyd's Rep 254.

- 9 Arbitration Act 1996 s 72(2).
- 10 le under the Arbitration Act 1996 s 67: see PARA 1276.
- 11 As to the meaning of 'substantive jurisdiction' see PARA 1239 note 3.
- 12 Arbitration Act 1996 s 72(2)(a).
- 13 le under the Arbitration Act 1996 s 68: see PARA 1277.
- 14 le within the meaning of the Arbitration Act 1996 s 68: see PARA 1277.
- 15 Arbitration Act 1996 s 72(2)(b).
- 16 le under the Arbitration Act 1996 s 70(2): see PARA 1279.
- 17 Arbitration Act 1996 s 72(2).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/ (11) CHALLENGING THE AWARD/1282. Loss of right to object.

1282. Loss of right to object.

If a party¹ to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement² or the arbitral tribunal³ or by any provision of Part I of the Arbitration Act 1996⁴, any objection that⁵:

- (1) the tribunal lacks substantive jurisdiction⁶;
- (2) the proceedings have been improperly conducted⁷;
- (3) there has been a failure to comply with the arbitration agreement or with any provision of Part I⁸; or
- (4) there has been any other irregularity affecting the tribunal or the proceedings⁹,

he may not raise that objection later before the tribunal or the court¹⁰, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection¹¹.

Where the tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling by any available arbitral process¹² of appeal or review, or by challenging the award¹³, does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of Part I, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling¹⁴.

- 1 As to the meaning of 'party' in relation to an arbitration agreement see PARA 1210 note 6.
- 2 As to the meaning of 'arbitration agreement' see PARA 1213. As to the reckoning of periods of time see PARA 1221 note 17. As to the power of the court to extend time limits see PARAS 1221, 1279.
- 3 As to the arbitral tribunal and the procedure for appointment of arbitrators see PARA 1226 et seq.
- 4 As to the application of the Arbitration Act 1996 Pt I (ss 1-84) see PARA 1209.
- 5 Arbitration Act 1996 s 73(1). The provisions of s 73 are mandatory: see PARA 1211.

6 Arbitration Act 1996 s 73(1)(a). As to the meaning of 'substantive jurisdiction' see PARA 1239 note 3. See *Athletic Union of Constantinople v National Basketball Association (No 2)* [2002] EWCA Civ 830, [2002] 3 All ER 897, [2002] All ER (Comm) 385 (the Court of Appeal had no jurisdiction to grant permission to appeal from a decision of the Commercial Court under the Arbitration Act 1996 s 67 (see PARA 1276)).

7 Arbitration Act 1996 s 73(1)(b).

8 Arbitration Act 1996 s 73(1)(c).

9 Arbitration Act 1996 s 73(1)(d).

10 As to the meaning of 'court', and as to the meaning of references to 'court' in cases where a judge-arbitrator has been appointed, see PARA 1251. As to the appointment of judge-arbitrators see PARA 1226 note 20.

11 Arbitration Act 1996 s 73(1). See *LG Caltex Gas Co Ltd v China National Petroleum Corpn* [2001] EWCA Civ 788, [2001] 4 All ER 875, [2001] 2 All ER (Comm) 97. It is unnecessary for an applicant to have had actual knowledge of the grounds of objection in order for him to lose his right to challenge the award; once the grounds of objection have arisen, the burden passes to the applicant to show that he did not know, or could not with reasonable diligence have discovered, those grounds: *Rustal Trading Ltd v Gill & Duffus SA* [2000] 1 Lloyd's Rep 14.

12 As to the meaning of 'available arbitral process' see PARA 1221 note 8.

13 As to challenging the award see PARA 1276 et seq.

14 Arbitration Act 1996 s 73(2).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(12) PROCEDURE FOR ARBITRATION CLAIMS UNDER THE ARBITRATION ACT 1996/1283. Case management of arbitration claims.

(12)

1283. Case management of arbitration claims.

Arbitration claims are allocated to the multi-track case management track¹, but the provisions of Part 29 of the Civil Procedure Rules², which contain general provisions about management of cases allocated to the multi-track and apply only to cases allocated to that track³, do not apply to arbitration claims⁴. The provisions of Part 62 of the Civil Procedure Rules⁵ contain rules about arbitration claims⁶. There are extensive automatic directions which apply unless the court orders to the contrary⁷.

For the purposes of the provisions of Part 62 of the Civil Procedure Rules relating to claims under the Arbitration Act 1996⁸, 'arbitration claim' means⁹:

- (1) any application to the court under the Arbitration Act 1996¹⁰;
- (2) a claim to determine whether there is a valid arbitration agreement, whether an arbitration tribunal is properly constituted, or what matters have been submitted to arbitration in accordance with an arbitration agreement¹¹;
- (3) a claim to declare that an award by an arbitral tribunal is not binding on a party¹²; and
- (4) any other application affecting arbitration proceedings (whether started or not), or an arbitration agreement¹³.

Detailed provision is made in respect of arbitration claims for the determination of a question as to the substantive jurisdiction of the arbitral tribunal¹⁴, and for the determination of a preliminary point of law¹⁵.

Separate provision is made in relation to arbitration claims under the old law¹⁶ and the enforcement of awards¹⁷, and the provisions of Part 62 of the Civil Procedure Rules relating to claims under the Arbitration Act 1996 do not apply to such claims¹⁸.

1 CPR 62.7(2).

2 Ie CPR Pt 29: see **CIVIL PROCEDURE** vol 11 (2009) PARA 293 et seq.

3 CPR 29.1. As to cases normally allocated to the multi-track see **CIVIL PROCEDURE** vol 11 (2009) PARA 269.

4 CPR 62.7(3). The provisions of CPR Pt 26 (which provide for the automatic transfer of some defended cases between courts and the allocation of defended cases to case management tracks) and any other rule that requires a party to file an allocation questionnaire do not apply: CPR 62.7(1). As to CPR Pt 26 and the preliminary stage of case management see **CIVIL PROCEDURE** vol 11 (2009) PARA 260 et seq.

5 The provisions of CPR Pt 62 came into force on 25 March 2002 and apply to all arbitration claims, whenever commenced: see the Civil Procedure (Amendment No 5) Rules 2001, SI 2001/4015, rr 1(c), 29(e), Sch 6. Except where the provisions of CPR Pt 62 otherwise provide, CPR Pt 58 (Commercial Court) applies to arbitration claims in the Commercial Court, CPR Pt 59 (Mercantile Court) applies to arbitration claims in the Mercantile Court and CPR Pt 60 (Technology and Construction Court claims) applies to arbitration claims in the Technology and Construction Court: CPR 62.1(3).

6 CPR 62.1(1). The provisions of CPR Pt 62 are supplemented by *Practice Direction--Arbitration* PD62: see PARAS 1284-1287.

7 CPR 62.7(4); *Practice Direction--Arbitration* PD62 para 6.1. The directions are set out in the practice direction to CPR Pt 62, ie *Practice Direction--Arbitration* PD62. A defendant who wishes to rely on evidence before the court must file and serve his written evidence within 21 days after the date by which he was required to acknowledge service, or, where a defendant is not required to file an acknowledgment of service, within 21 days after service of the arbitration claim form: para 6.2. As to arbitration claim forms see PARA 1284. A claimant who wishes to rely on evidence in reply to written evidence so filed must file and serve his written evidence within seven days after service of the defendant's evidence: para 6.3. Agreed indexed and paginated bundles of all the evidence and other documents to be used at the hearing must be prepared by the claimant: para 6.4. Not later than five days before the hearing date, estimates for the length of the hearing must be filed together with a complete set of the documents to be used: para 6.5. Not later than two days before the hearing date, the claimant must file and serve (1) a chronology of the relevant events cross-referenced to the bundle of documents (para 6.6(1)); (2) where necessary, a list of the persons involved (para 6.6(2)); and (3) a skeleton argument which lists succinctly the issues which arise for decision, the grounds of relief or opposing relief to be relied upon, the submissions of fact to be made with the references to the evidence, and the submissions of law with references to the relevant authorities (para 6.6(3)). Not later than the day before the hearing date, the defendant must file and serve a skeleton argument which lists succinctly the issues which arise for decision, the grounds of relief or opposing relief to be relied upon, the submissions of fact to be made with the references to the evidence, and the submissions of law with references to the relevant authorities: para 6.7.

8 Ie CPR Pt 62 Section I (rr 62.2-62.10).

9 CPR 62.2(1); and see *Practice Direction--Arbitration* PD62 para 1.1. This definition is expressed to be for the purposes of CPR Pt 62 Section I: see CPR 62.2(1).

10 CPR 62.2(1)(a). For the purposes of CPR Pt 62, references to the Arbitration Act 1996 or any particular section of that Act include references to the Act or to the particular section as applied with modifications by the ACAS Arbitration Scheme (England and Wales) Order 2001, SI 2001/1185 (revoked; now the ACAS Arbitration Scheme (Great Britain) Order 2004, SI 2004/753) (see **EMPLOYMENT** vol 40 (2009) PARA 779): CPR 62.1(2)(e).

11 CPR 62.2(1)(b).

12 CPR 62.2(1)(c).

13 CPR 62.2(1)(d).

14 Ie under the Arbitration Act 1996 s 32: see PARA 1241.

15 See *Practice Direction--Arbitration* PD62 para 9.1. The text refers to determination of a preliminary point of law under the Arbitration Act 1996 s 45: see PARA 1255. Where an arbitration claim is made without the agreement in writing of all the other parties to the arbitral proceedings but with the permission of the arbitral tribunal, the written evidence or witness statements filed by the parties must set out any evidence relied on by the parties in support of their contention that the court should, or should not, consider the claim: *Practice Direction--Arbitration* PD62 para 9.2. As soon as practicable after the written evidence is filed, the court will decide whether or not it should consider the claim and, unless the court otherwise directs, will so decide without a hearing: para 9.3.

16 le CPR Pt 62 Section II (rr 62.11-62.16): see PARA 1203. As to the meaning of 'old law' see PARA 1203.

17 le CPR Pt 62 Section III (rr 62.17-62.21): see PARAS 1275, 1292-1293, 1307.

18 CPR 62.2(2).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(12) PROCEDURE FOR ARBITRATION CLAIMS UNDER THE ARBITRATION ACT 1996/1284. Starting the arbitration claim and the arbitration claim form.

1284. Starting the arbitration claim and the arbitration claim form.

An arbitration claim¹ under the Arbitration Act 1996², other than an application to stay legal proceedings³, must be started in accordance with the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996⁴. An arbitration claim is started by the issue of an arbitration claim form⁵ in accordance with the Part 8 procedure⁶ of the Civil Procedure Rules⁷, unless it is an application to stay legal proceedings⁸ which is made by application notice to the court dealing with those proceedings⁹.

An arbitration claim form may be issued out of¹⁰:

- (1) the Admiralty and Commercial Registry at the Royal Courts of Justice in London, in which case it will be entered in the commercial list¹¹;
- (2) the Technology and Construction Court Registry in St Dunstan's House in London, in which case it will be entered in the TCC list¹²;
- (3) the district registry of the High Court where a mercantile court is established, in which case it will be entered in the mercantile list¹³;
- (4) the district registry of the High Court where the arbitration claim form is marked 'Technology and Construction Court' in the top right hand corner, in which case it will be entered in the TCC list¹⁴.

An arbitration claim form relating to a landlord and tenant or partnership dispute must be issued in the Chancery Division of the High Court¹⁵.

An arbitration claim form must, in the case of an appeal, or application for permission to appeal, from a judge-arbitrator, be issued in the Civil Division of the Court of Appeal¹⁶.

An arbitration claim form must¹⁷:

- (a) include a concise statement of the remedy claimed, and any questions on which the claimant seeks the decision of the court¹⁸;
- (b) give details of any arbitration award challenged by the claimant, identifying which part or parts of the award are challenged and specifying the grounds for the challenge¹⁹;
- (c) show that any statutory requirements have been met²⁰;

- (d) specify under which provision of the Arbitration Act 1996 the claim is made²¹;
- (e) identify against which, if any, defendants a costs order is sought²²; and
- (f) specify either (i) the persons on whom the arbitration claim form is to be served, stating their role in the arbitration and whether they are defendants²³; or (ii) that the claim is made without notice²⁴ and the grounds relied on²⁵.

Detailed provision is also made in respect of the content of an arbitration claim form where a party seeks permission to appeal to the court on a question of law arising out of an arbitration award²⁶.

Where the claimant applies for an order for extension of time for beginning arbitral proceedings or other dispute resolution procedures²⁷, he may include in his arbitration claim form an alternative application for a declaration that such an order is not needed²⁸.

An arbitration claim form may only be inspected with the permission of the court²⁹.

1 As to the meaning of 'arbitration claim' see PARA 1283.

2 As to references to the Arbitration Act 1996 see PARA 1283 note 10.

3 Ie under the Arbitration Act 1996 s 9: see PARA 1222.

4 See CPR 62.3(3); *Practice Direction--Arbitration* PD62 para 2.1. As to the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, see PARA 1251. As to the application of CPR Pt 62 Section I (rr 62.2-62.10) see PARA 1283.

5 For the purposes of CPR Pt 62, 'arbitration claim form' means a claim form in the form set out in *Practice Direction--Arbitration* PD62 Appendix A: CPR 62.1(2)(f); *Practice Direction--Arbitration* PD62 para 2.2.

6 The provisions of CPR Pt 8 provide for an alternative procedure for starting claims: see **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq.

7 See CPR 62.3(1). An application for an interim remedy under the Arbitration Act 1996 s 44 (see PARA 1254) must be made in an arbitration claim form: CPR 8.1.

8 See note 3.

9 See CPR 62.3(2).

10 *Practice Direction--Arbitration* PD62 para 2.3 (which is expressed to be subject to para 2.1 (see the text to note 4)).

Although generally an application for the transfer of proceedings to or from a specialist list must be made to a judge dealing with claims in that list (see CPR 30.5; and **CIVIL PROCEDURE** vol 11 (2009) PARA 67), a judge of the Technology and Construction Court may transfer the claim to any other court or specialist list (CPR 62.3(4)). As to the Technology and Construction Court see **CIVIL PROCEDURE** vol 12 (2009) PARA 1546; **COURTS** vol 10 (Reissue) PARA 616.

11 *Practice Direction--Arbitration* PD62 para 2.3(1). As to the Admiralty Court and the Commercial Court see **COURTS** vol 10 (Reissue) PARA 615. As to the Royal Courts of Justice see **COURTS** vol 10 (Reissue) PARA 601.

12 *Practice Direction--Arbitration* PD62 para 2.3(1).

13 *Practice Direction--Arbitration* PD62 para 2.3(1). As to district registries of the High Court see **COURTS** vol 10 (Reissue) PARA 646. As to mercantile courts see **CIVIL PROCEDURE** vol 12 (2009) PARA 1545.

14 *Practice Direction--Arbitration* PD62 para 2.3(1).

15 *Practice Direction--Arbitration* PD62 para 2.3(2).

16 *Practice Direction--Arbitration* PD62 para 2.3A. The judge hearing the application may adjourn the matter for oral argument before two judges of that court: para 2.3A.

- 17 CPR 62.4(1).
- 18 CPR 62.4(1)(a).
- 19 CPR 62.4(1)(b).
- 20 CPR 62.4(1)(c).
- 21 CPR 62.4(1)(d). See PARA 1283 note 10.
- 22 CPR 62.4(1)(e).
- 23 CPR 62.4(1)(f)(i).
- 24 le under the Arbitration Act 1996 s 44(3): see PARA 1254.
- 25 CPR 62.4(1)(f)(ii).
- 26 See *Practice Direction--Arbitration* PD62 para 12. The arbitration claim form must identify the question of law, and state the grounds on which the party alleges that permission should be given: para 12.1. The written evidence in support of the application must set out any evidence relied on by the party for the purpose of satisfying the court of the matters referred to in the Arbitration Act 1996 s 69(3) (see PARA 1278), and for the purpose of satisfying the court that permission should be given: *Practice Direction--Arbitration* PD62 para 12.2. The written evidence filed by the respondent to the application must state the grounds on which the respondent opposes the grant of permission, set out any evidence relied on by him relating to the matters mentioned in the Arbitration Act 1996 s 69(3), and specify whether the respondent wishes to contend that the award should be upheld for reasons not expressed (or not fully expressed) in the award and, if so, state those reasons: *Practice Direction--Arbitration* PD62 para 12.3. The court will normally determine applications for permission to appeal without an oral hearing: *Practice Direction--Arbitration* PD62 para 12.4. Where the court refuses an application for permission to appeal without an oral hearing, it must provide brief reasons: para 12.5. Where the court considers that an oral hearing is required, it may give such further directions as are necessary: para 12.6.
- 27 le under the Arbitration Act 1996 s 12: see PARA 1221.
- 28 CPR 62.4(3).
- 29 *Practice Direction--Arbitration* PD62 para 5.1.

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1285. Service of the arbitration claim form.

Unless the court orders otherwise an arbitration claim form¹ must be served on the defendant within one month from the date of issue². The court may exercise its powers³ to permit service of an arbitration claim form at the address of a party's solicitor or representative acting for him in the arbitration⁴. Where the arbitration claim form is served by the claimant he must file a certificate of service within seven days of service of the arbitration claim form⁵.

The court may give permission to serve an arbitration claim form out of the jurisdiction if⁶:

- (1) the claimant seeks to challenge, or appeal on a question of law arising out of, an arbitration award made within the jurisdiction⁷;
- (2) the claim is for an order in support of arbitral proceedings⁸; or
- (3) the claimant seeks some other remedy or requires a question to be decided by the court affecting an arbitration (whether started or not), an arbitration agreement or an arbitration award⁹; and the seat of the arbitration is or will be within the jurisdiction or certain conditions¹⁰ are satisfied¹¹.

An application for permission under head (1), head (2) or head (3) above must be supported by written evidence stating the grounds on which the application is made, and showing in what place or country the person to be served is, or probably may be found¹². An order giving permission to serve an arbitration claim form out of the jurisdiction must specify the period within which the defendant may file an acknowledgment of service¹³.

1 As to the meaning of 'arbitration claim form' see PARA 1284 note 5.

2 CPR 62.4(2). As to the application of CPR Pt 62 Section I (rr 62.2-62.10) see PARA 1283. The general rules as to service of a claim form (see CPR 7.5; and **CIVIL PROCEDURE** vol 11 (2009) PARA 120) and extension of time for serving a claim form (see CPR 7.6; and **CIVIL PROCEDURE** vol 11 (2009) PARA 121) are modified accordingly: CPR 62.4(2).

3 Ie under CPR 6.8; and **CIVIL PROCEDURE** vol 11 (2009) PARA 152.

4 *Practice Direction--Arbitration* PD62 para 3.1.

5 *Practice Direction--Arbitration* PD62 para 3.2. As to what a certificate of service must show see CPR 6.10; and **CIVIL PROCEDURE** vol 11 (2009) PARA 154.

6 CPR 62.5(1). The rules relating to the method of service where a claim form is to be served out of the jurisdiction (see CPR 6.24), service through foreign governments, judicial authorities and British consular authorities (see CPR 6.25-6.26), service in accordance with EC Council Regulation 1348/2000 (OJ L160, 30.06.2000, p 37) on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (see **CIVIL PROCEDURE** vol 11 (2009) PARA 157 et seq) (see CPR 6.26A), service of a claim form on a state (see CPR 6.27), the translation of a claim form (see CPR 6.28), and the undertaking to be responsible for expenses of the Foreign and Commonwealth Office (see CPR 6.29), apply to the service of an arbitration claim form under head (1), head (2) or head (3) in the text: see CPR 62.5(3). See **CIVIL PROCEDURE** vol 11 (2009) PARAS 173-179. As to the Foreign and Commonwealth Office see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 459 et seq.

7 CPR 62.5(1)(a). The place where an award is treated as made is determined by the Arbitration Act 1996 s 53 (see PARA 1264); CPR 62.5(1)(a). As to references to the Arbitration Act 1996 see PARA 1283 note 10.

8 CPR 62.5(1)(b). The order referred to in the text is an order under the Arbitration Act 1996 s 44: see PARA 1254.

9 CPR 62.5(1)(c)(i).

10 Ie the conditions in the Arbitration Act 1996 s 2(4): see PARA 1209 note 5.

11 CPR 62.5(1)(c)(ii). As to the seat of the arbitration see PARA 1212.

12 CPR 62.5(2).

13 CPR 62.5(4).

UPDATE

1285 Service of the arbitration claim form

NOTES 5, 6--CPR Pt 6 substituted: SI 2008/2178.

NOTE 6--Regulation 1348/2000 replaced by European Parliament and EC Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (service of documents).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(12) PROCEDURE FOR ARBITRATION CLAIMS UNDER THE ARBITRATION ACT 1996/1286. Notice.

1286. Notice.

Where notice must be given to an arbitrator or any other person it may be given by sending¹ him a copy of the arbitration claim form², and any written evidence in support³.

Where the Arbitration Act 1996⁴ requires an application to the court to be made on notice to any other party to the arbitration, that notice must be given by making that party a defendant⁵.

Where an arbitration claim⁶ is made to remove an arbitrator⁷ or for the adjustment of the fees and expenses of arbitrators⁸, or where the arbitral tribunal withholds an award in the case of non-payment of the fees and expenses of arbitrators⁹, each arbitrator must be a defendant¹⁰.

Where an arbitrator or the Advisory, Conciliation and Arbitration Service ('ACAS')¹¹ is sent a copy of an arbitration claim form¹², that arbitrator or ACAS, as the case may be, may apply to be made a defendant, or make representations to the court¹³ by filing written evidence or in writing¹⁴. Such an application to be made a defendant must be served on the claimant but need not be served on any other party¹⁵.

1 Where a rule provides for a document to be sent, it may be sent by first class post, through a document exchange, or by fax, electronic mail or other means of electronic communication: *Practice Direction--Arbitration* PD62 para 1.3.

2 As to the meaning of 'arbitration claim form' see PARA 1284 note 5.

3 CPR 62.6(2).

4 As to references to the Arbitration Act 1996 see PARA 1283 note 10.

5 CPR 62.6(3).

6 As to the meaning of 'arbitration claim' see PARA 1283.

7 *le* under the Arbitration Act 1996 s 24: see PARA 1233.

8 *le* under the Arbitration Act 1996 s 28: see PARA 1236.

9 *le* under the Arbitration Act 1996 s 56: see PARA 1266.

10 See CPR 62.6(1). As to the application of CPR Pt 62 Section I (rr 62.2-62.10) see PARA 1283.

11 *le* in a claim under the Arbitration Act 1996 as applied with modifications by the ACAS Arbitration Scheme (Great Britain) Order 2004, SI 2004/753: see **EMPLOYMENT** vol 40 (2009) PARA 779. As to the constitution of ACAS see **EMPLOYMENT** vol 41 (2009) PARA 1182 et seq.

12 *le* including an arbitration claim form sent under CPR 62.6(2): see the text to note 3.

13 *Practice Direction--Arbitration* PD62 para 4.1.

14 See *Practice Direction--Arbitration* PD62 para 4.3.

15 See *Practice Direction--Arbitration* PD62 para 4.2.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/2. ARBITRATION UNDER PART 1 OF THE ARBITRATION ACT 1996/(12) PROCEDURE FOR ARBITRATION CLAIMS UNDER THE ARBITRATION ACT 1996/1287. Hearings.

1287. Hearings.

The general rule that a hearing is to be in public¹ does not apply² to arbitration claims³ where the court may order that an arbitration claim be heard either in public or in private⁴. Subject to any order so made, the determination of a preliminary point of law⁵, or an appeal on a question of law arising out of an award⁶, will be heard in public⁷ and all other arbitration claims will be heard in private⁸.

Having regard to the overriding objective⁹ the court may decide particular issues without a hearing¹⁰. The court will generally decide whether to extend the time limit for bringing an application or appeal against an award¹¹ without a hearing¹². Where the court makes an order extending the time limit, the defendant must file his written evidence within 21 days from service of the order¹³.

Where there is both an application challenging an award on the ground of serious irregularity¹⁴ and an appeal on a question of law¹⁵, it may be possible to hold a joint hearing¹⁶.

1 Ie CPR 39.2: see **CIVIL PROCEDURE** vol 11 (2009) PARA 6.

2 CPR 62.10(2). As to the application of CPR Pt 62 Section I (rr 62.2-62.10) see PARA 1283.

3 As to the meaning of 'arbitration claim' see PARA 1283.

4 CPR 62.10(1). As to the factors a court should take into account in determining whether an arbitration claim be heard either in public or in private see *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207, [2004] 4 All ER 746, [2004] 2 Lloyd's Rep 179.

5 Ie under the Arbitration Act 1996 s 45: see PARA 1255. As to references to the Arbitration Act 1996 see PARA 1283 note 10.

6 Ie under the Arbitration Act 1996 s 69: see PARA 1278.

7 CPR 62.10(3)(a). The provisions of CPR 62.10(3)(a) do not apply to the preliminary question of whether the court is satisfied of the matters set out in the Arbitration Act 1996 s 45(2)(b) (see PARA 1255), or an application for permission to appeal under s 69(2)(b) (see PARA 1278): CPR 62.10(4).

8 CPR 62.10(3)(b).

9 As to the overriding objective see PARA 1204; and **CIVIL PROCEDURE** vol 11 (2009) PARA 33 et seq.

10 *Practice Direction--Arbitration* PD62 para 10.1. The issues that may be decided without a hearing include eg the question whether the court is satisfied as to the matters set out in the Arbitration Act 1996 s 32(2)(b) (see PARA 1241) or s 45(2)(b) (see PARA 1255): see *Practice Direction--Arbitration* PD62 paras 9.3, 10.1; and PARA 1283.

11 Ie under the Arbitration Act 1996 s 70(3): see PARA 1279.

12 *Practice Direction--Arbitration* PD62 para 10.2.

13 *Practice Direction--Arbitration* PD62 para 10.2.

14 Ie under the Arbitration Act 1996 s 68: see PARA 1277.

15 Ie under the Arbitration Act 1996 s 69: see PARA 1278.

16 See eg *Alphapoint Shipping Ltd v Rotem Amfert Negev Ltd, The Agios Dimitrios* [2004] EWHC 2232 (Comm), [2005] 1 Lloyd's Rep 23.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/3. RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS/(1) FOREIGN AWARDS/1288. Foreign awards.

3.

(1)

1288. Foreign awards.

The provisions of Part II of the Arbitration Act 1950¹ apply to any award made after 28 July 1924²:

- (1) where the award is made in pursuance of an arbitration agreement to which the Protocol on Arbitration Clauses (1923) applies³; and
- (2) where the arbitration agreement is made between persons one of whom is subject to the jurisdiction of a state party to the Geneva Convention (1927)⁴, and the other of whom is a person subject to the jurisdiction of some other such state⁵; and
- (3) where the arbitration agreement was made in a territory to which the Geneva Convention (1927) applies⁶.

Such an award is referred to as a 'foreign award'⁷, and is enforceable⁸ in England and Wales either by action or in the same manner as the award of an arbitrator is enforceable by virtue of the Arbitration Act 1996⁹.

The provisions of Part II of the Arbitration Act 1950 have been almost entirely superseded by the Arbitration Act 1996, which provides in particular for the recognition and enforcement of New York Convention awards¹⁰. The provisions of Part II of the Arbitration Act 1950 therefore apply in relation to foreign awards within the meaning of heads (1) to (3) above which are not also New York Convention awards¹¹.

For a foreign award to be enforceable under Part II of the Arbitration Act 1950¹² it must:

- (a) have been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed¹³;
- (b) have been made by the tribunal provided for in the agreement or constituted in the manner agreed upon by the parties¹⁴;
- (c) have been made in conformity with the law governing the arbitration procedure¹⁵;
- (d) have become final in the country in which it was made¹⁶;
- (e) have been in respect of a matter which may lawfully be referred to arbitration under the law of England and Wales¹⁷.

Furthermore, the enforcement of the award must not be contrary to the public policy or the law of England and Wales¹⁸.

A foreign award is not enforceable under Part II of the Arbitration Act 1950 if the court dealing with the case is satisfied that¹⁹:

- (i) the award has been annulled in the country in which it has been made²⁰; or

- (ii) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented²¹; or
- (iii) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the arbitration agreement²².

If a party seeking to resist the enforcement proves that there is any ground entitling him to contest the validity of the award²³, the court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal²⁴.

The party seeking to enforce a foreign award must produce the following documents²⁵:

- (A) the original award or a copy of it duly authenticated in the manner required by the law of the country in which it was made²⁶; and
- (B) evidence proving that the award has become final²⁷; and
- (C) such evidence as may be necessary to prove that the award is a foreign award and that the conditions in heads (a), (b) and (c) above are satisfied²⁸.

If any document required to be produced is in a foreign language, it is the duty of the party seeking to enforce the award to produce a translation certified as correct by a diplomatic or consular agent of the country to which that party belongs, or certified as correct in such other manner as may be sufficient according to the law of England and Wales²⁹. Rules of court³⁰ may be made³¹ with respect to the evidence which must be furnished by a party seeking to enforce an award under Part II of the Arbitration Act 1950³².

1 The effect of the Arbitration Act 1950 Pt II (ss 35-42) is to put a foreign award in the same position as an English award in relation to enforcement, subject to fulfilling the conditions set out in s 37 (see the text and notes 12-24): see *Union Nationale des Co-opératives Agricoles de Céréales v Robert Catterall & Co Ltd* [1959] 2 QB 44, [1959] 1 All ER 721. The Arbitration Act 1950 Pt II does not prejudice any rights which any person would have had of enforcing in England and Wales any award or of availing himself in England and Wales of any award if neither Pt II nor the Arbitration (Foreign Awards) Act 1930 Pt I (now repealed) had been enacted (Arbitration Act 1950 s 40(a); Interpretation Act 1978 Schs 1, 2 para 5(a)), nor does the Arbitration Act 1950 Pt II apply to awards made on an arbitration agreement governed by the law of England and Wales (see s 40(b); Interpretation Act 1978 Schs 1, 2 para 5(a)).

2 Arbitration Act 1950 s 35(1).

3 Arbitration Act 1950 s 35(1)(a). The Protocol on Arbitration Clauses (1923) is set out in the Arbitration Act 1950 Sch 1. The contracting states for the purposes of the protocol are as follows: Albania (TS 56 (1925); Cmd 2577); Austria (TS 29 (1928); Cmd 3266); Bahamas (TS 43 (1931); Cmd 4015); Belgium (TS 56 (1925); Cmd 2577); Brazil (TS 38 (1932); Cmd 4249); British Guiana (TS 32 (1926); Cmd 2804); British Honduras (TS 32 (1926); Cmd 2804); Burma (excluding Karenni States) (TS 75 (1938); Cmd 5930); Ceylon (TS 75 (1926); Cmd 2804); Czechoslovakia (TS 43 (1931); Cmd 4015); Danzig (TS 75 (1938); Cmd 5930); Denmark (TS 56 (1925); Cmd 2577); Estonia (TS 33 (1929); Cmd 3491); Falkland Islands and Dependencies (TS 32 (1926); Cmd 2804) (TS 39 (1934); Cmd 4809); Finland (TS 56 (1925); Cmd 2577); France (TS 29 (1928); Cmd 3266); Gambia (Colony and Protectorate) (TS 32 (1926); Cmd 2804) (TS 39 (1934); Cmd 4809); Germany (TS 56 (1925); Cmd 2577); Gibraltar (TS 32 (1926); Cmd 2804); Gold Coast (including Ashanti, Northern Territories and Togoland under British Mandate) (TS 32 (1926); Cmd 280) (TS 43 (1931); Cmd 4015); Greece (TS 32 (1926); Cmd 2804); India (TS 56 (1937); Cmd 5654); Iraq (TS 32 (1926); Cmd 2804); Italy (TS 56 (1925); Cmd 2577); Jamaica (including Turks and Caicos Islands and the Cayman Islands) (TS 32 (1926); Cmd 280) (TS 43 (1931); Cmd 4015); Japan (including Chosen, Taiwan, Karafuto, leased territory of Kwangtung and Japanese Mandated Territories) (TS 28 (1928); Cmd 326) (TS 33 (1929); Cmd 3491); Kenya (Colony and Protectorate) (TS 32 (1926); Cmd 2804) (TS 39 (1934); Cmd 4809); Leeward Islands (TS 32 (1926); Cmd 2804); Luxembourg (TS 52 (1930); Cmd 3816); Malta (TS 32 (1926); Cmd 2804); Monaco (TS 29 (1927); Cmd 3022); Netherlands (including Netherlands Indies, Surinam and Curaçao) (TS 56 (1925); Cmd 2577) (TS 75 (1938); Cmd 5930) (TS 31 (1940); Cmd 6253); Newfoundland (TS 56 (1925); Cmd 2577); New Zealand (TS 32 (1926); Cmd 2804); Northern Rhodesia (TS 32 (1926); Cmd 2804); Norway (TS 29 (1927); Cmd 3022); Palestine (excluding Trans-Jordan) (TS 32 (1926); Cmd 2804) (TS 39 (1934); Cmd 4809); Poland (TS 43 (1931); Cmd 4015); Portugal (TS 52 (1930);

Cmd 3816); Romania (TS 56 (1925); Cmd 2577); St Helena (TS 32 (1926); Cmd 2804); Siam (TS 52 (1930); Cmd 3816); Southern Rhodesia (TS 56 (1925); Cmd 2577); Spain (TS 32 (1926); Cmd 2804); Sweden (TS 33 (1926); Cmd 3491); Switzerland (TS 29 (1928); Cmd 3266); Tanganyika Territory (TS 32 (1926); Cmd 2804); Trans-Jordan (TS 39 (1934); Cmd 4809); Uganda (TS 33 (1929); Cmd 3491); United Kingdom of Great Britain and Northern Ireland (TS 4 (1925); Cmd 2312); Windward Islands (Grenada, St Lucia, St Vincent) (TS 32 (1926); Cmd 2804); Zanzibar (TS 32 (1926); Cmd 2804).

The names of these states are those by which they were known at the date on which they became contracting states; many have subsequently changed.

4 le the Convention on the Execution of Foreign Arbitral Awards signed at Geneva on 26 September 1927. The Geneva Convention (1927) is set out in the Arbitration Act 1950 Sch 2. The states which are listed as parties to the Geneva Convention (1927) and the territories to which the Convention applies are as follows: the United Kingdom of Great Britain and Northern Ireland, Anguilla, British Virgin Islands, Cayman Islands, Falkland Islands, Falkland Islands Dependencies, Gibraltar, Hong Kong, Montserrat, Turks and Caicos Islands, Antigua and Barbuda, Austria, Bahamas, Bangladesh, Belgium, Belize, Czechoslovakia, Denmark, Dominica, Finland, France, Germany, Greece, Grenada, Guyana, India, Republic of Ireland, Israel, Italy, Japan, Kenya, Luxembourg, Malta, Mauritius, Netherlands (including Curaçao), New Zealand, Pakistan, Portugal, Romania, St Christopher and Nevis, St Lucia, Spain, Sweden, Switzerland, Tanzania, Thailand, Western Samoa, Yugoslavia, Zambia: Arbitration (Foreign Awards) Order 1984, SI 1984/1168, art 2, Sch 1.

By virtue of the Interpretation Act 1978 s 17(2)(b) (see **STATUTES** vol 44(1) (Reissue) PARA 1303), Orders in Council made under the Arbitration (Foreign Awards) Act 1930 (repealed) continue to have effect under the Arbitration Act 1950 s 35(3). Although no Orders have been revoked, they are largely superseded by the Arbitration (Foreign Awards) Order 1984, SI 1984/1168.

5 Arbitration Act 1950 s 35(1)(b). See also *Dalmia Cement Ltd v National Bank of Pakistan* [1975] QB 9, [1974] 3 All ER 189, [1974] 2 Lloyd's Rep 98.

6 Arbitration Act 1950 s 35(1)(b).

7 Arbitration Act 1950 s 35(1).

8 le subject to the provisions of the Arbitration Act 1950 Pt II.

9 Arbitration Act 1950 s 36(1) (amended by the Arbitration Act 1996 s 107(1), Sch 3 para 10); Interpretation Act 1978 ss 5, 22(1), Schs 1, 2 para 5(a). As to enforcement of the award see the Arbitration Act 1996 s 66; and PARA 1274. Any foreign award which would be enforceable under the Arbitration Act 1950 Pt II is to be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in England; and any references in Pt II to enforcing a foreign award are to be construed as including references to relying on an award: s 36(2).

10 As to the meaning of 'New York Convention award' see PARA 1289.

11 Arbitration Act 1996 s 99. As to the recognition and enforcement of New York Convention awards see PARA 1290.

12 Arbitration Act 1950 s 37(1).

13 Arbitration Act 1950 s 37(1)(a). For the purposes of Pt II, an award is not deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made: s 39.

14 Arbitration Act 1950 s 37(1)(b).

15 Arbitration Act 1950 s 37(1)(c).

16 Arbitration Act 1950 s 37(1)(d).

17 Arbitration Act 1950 s 37(1)(e); Interpretation Act 1978 Schs 1, 2 para 5(a).

18 Arbitration Act 1950 s 37(1); Interpretation Act 1978 Schs 1, 2 para 5(a). See *Soleimany v Soleimany* [1999] QB 785, [1999] 3 All ER 847, CA.

19 Arbitration Act 1950 s 37(2).

20 Arbitration Act 1950 s 37(2)(a).

21 Arbitration Act 1950 s 37(2)(b).

22 Arbitration Act 1950 s 37(2)(c). If the award does not deal with all the questions referred, the court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the court thinks fit: s 37(2).

23 Ie other than the non-existence of the conditions specified in the Arbitration Act 1950 s 37(1)(a)-(c) (see heads (a)-(c) in the text), or the existence of the conditions specified in s 37(2)(b), (c) (see heads (ii), (iii) in the text): s 37(3).

24 Arbitration Act 1950 s 37(3).

25 Arbitration Act 1950 s 38(1).

26 Arbitration Act 1950 s 38(1)(a).

27 Arbitration Act 1950 s 38(1)(b).

28 Arbitration Act 1950 s 38(1)(c).

29 Arbitration Act 1950 s 38(2); Interpretation Act 1978 Schs 1, 2 para 5(a).

30 As to the meaning of 'rules of court' see PARA 1221 note 7.

31 Ie under the Supreme Court Act 1981 s 84: see **COURTS** vol 10 (Reissue) PARAS 577-578. As from a day to be appointed, the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(1) (to be brought into force by an order under s 148(1)). At the date at which this volume states the law, no such day had been appointed.

32 Arbitration Act 1950 s 38(3) (which is expressed to be subject to the provisions of s 38(1)-(2) (see the text to notes 25-29)).

UPDATE

1288 Foreign awards

NOTE 31--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/3. RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS/(2) NEW YORK CONVENTION AWARDS/1289. New York Convention awards.

(2)

1289. New York Convention awards.

'New York Convention award' means an award made in pursuance of an arbitration agreement¹ in the territory of a state, other than the United Kingdom², which is a party to the New York Convention (1958)³. An award is to be treated as made at the seat of the arbitration⁴, regardless of where it was signed, dispatched or delivered to any of the parties⁵. If Her Majesty by Order in Council declares that a state specified in the order is a party to the New York Convention, or is a party in respect of any territory so specified, the Order is, while in force, conclusive evidence of that fact⁶.

1 For the purposes of the Arbitration Act 1996 s 100(1) and of the provisions of the Arbitration Act 1996 Pt III (ss 99-104) relating to such awards, 'arbitration agreement' means an arbitration agreement in writing: s 100(2)(a). As to the meaning of 'agreement in writing' see PARA 1213; definition applied by s 100(2).

2 As to the meaning of 'United Kingdom' see PARA 1202 note 6.

3 Arbitration Act 1996 s 100(1). 'New York Convention' means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958 (New York, 10 June 1958; Cmnd 6419): Arbitration Act 1996 s 100(4). An award made in the territory of a foreign state which is a party to the Convention is enforceable in the United Kingdom irrespective of whether the state in question was a party to the Convention at the date either of the award or of the arbitration agreement: *Minister of Public Works of the Kuwait State Government v Sir Frederick Snow & Partners (a firm)* [1984] AC 426, [1984] 1 All ER 733, [1984] 1 Lloyd's Rep 458, HL.

4 As to the meaning of 'seat of the arbitration' see PARA 1212; definition applied by the Arbitration Act 1996 s 100(2).

5 Arbitration Act 1996 s 100(2)(b).

6 Arbitration Act 1996 s 100(3). By virtue of the Interpretation Act 1978 s 17(2)(b) (see **STATUTES** vol 44(1) (Reissue) PARA 1303), the Arbitration (Foreign Awards) Order 1984, SI 1984/1168, the Arbitration (Foreign Awards) Order 1989, SI 1989/1348, and the Arbitration (Foreign Awards) Order 1993, SI 1993/1256, have effect as if made under the Arbitration Act 1996 s 100(3).

The states which are listed as parties to the New York Convention are as follows: Algeria, Antigua, Argentina, Australia (including all the external territories for the international relations of which Australia is responsible), Austria, Bahrain, Barbuda, Belgium, Belize, Benin, Botswana, Bulgaria, Burkina Faso, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Canada, Central African Republic, Chile, China, Columbia, Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark (including Greenland and the Faroe Islands), Djibouti, Dominica, Ecuador, Egypt, Finland, France (including all the territories of the French Republic), Germany, Ghana, Greece, Guatemala, Haiti, Holy See, Hungary, India, Indonesia, Republic of Ireland, Israel, Italy, Japan, Jordan, Kenya, Korea, Kuwait, Luxembourg, Madagascar, Malaysia, Mexico, Monaco, Morocco, Netherlands (including the Netherlands Antilles), New Zealand, Niger, Nigeria, Norway, Panama, Peru, Philippines, Poland, Romania, San Marino, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syria, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Ukrainian Socialist Soviet Republic, Union of Soviet Socialist Republics, the United States of America (including all the territories for the international relations of which the United States of America is responsible), Uruguay, Yugoslavia: see the Arbitration (Foreign Awards) Order 1984, SI 1984/1168, art 3, Sch 2 (amended by SI 1985/455); and the Arbitration (Foreign Awards) Order 1989, SI 1989/1348, art 2, Schedule (amended by SI 1993/1256).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/3. RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS/(2) NEW YORK CONVENTION AWARDS/1290. Recognition and enforcement of awards.

1290. Recognition and enforcement of awards.

A New York Convention award¹ must be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England, Wales or Northern Ireland². A New York Convention award may, by permission of the court³, be enforced in the same manner as a judgment or order of the court to the same effect⁴. Where permission is so given, judgment may be entered in terms of the award⁵.

A party seeking the recognition or enforcement of a New York Convention award must produce the duly authenticated original award or a duly certified copy of it, and the original arbitration agreement⁶ or a duly certified copy of it⁷. If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent⁸.

The provisions of Part III of the Arbitration Act 1996⁹ do not affect any right to rely upon or enforce a New York Convention award at common law or under the provisions relating to the enforcement of awards in Part I of the Arbitration Act 1996¹⁰.

- 1 As to the meaning of 'New York Convention award' see PARA 1289.
- 2 Arbitration Act 1996 s 101(1).
- 3 As to the meaning of 'court' see PARA 1251.
- 4 Arbitration Act 1996 s 101(2). Proceedings under s 101(2) may be commenced in any county court: High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, SI 1996/3215, art 4; and see PARA 1251. It is a matter of dispute whether the court would have jurisdiction to award security for costs against a judgment creditor in respect of a New York Convention award: *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2007] EWCA Civ 988, [2008] 1 All ER (Comm) 209, [2007] 2 Lloyd's Rep 588 (in the instant case, either it did not have, or it should exercise its discretion not to have, jurisdiction).
- 5 Arbitration Act 1996 s 101(3). See *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2008] EWHC 1108 (Comm), [2008] All ER (D) 280 (May).
- 6 As to the meaning of 'arbitration agreement' see PARA 1289 note 1.
- 7 Arbitration Act 1996 s 102(1).
- 8 Arbitration Act 1996 s 102(2).
- 9 In the Arbitration Act 1996 Pt III (ss 99-104).
- 10 Arbitration Act 1996 s 104. The text refers to the enforcement of awards under s 66: see PARA 1274.

UPDATE

1290 Recognition and enforcement of awards

NOTES 4, 5--A judge enforcing an award made in a New York Convention arbitration is entitled to order enforcement of only part of the award: *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corpn* [2008] EWCA Civ 1157, [2009] 1 All ER (Comm) 611.

NOTE 5--*Gater Assets*, cited, reported at [2009] 1 All ER (Comm) 667.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/3. RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS/(2) NEW YORK CONVENTION AWARDS/1291. Refusal of recognition or enforcement.

1291. Refusal of recognition or enforcement.

Recognition or enforcement of a New York Convention award¹ must not be refused except²:

- (1) if the person against whom it is invoked proves³:
 12. (a) that a party to the arbitration agreement⁴ was, under the law applicable to him, under some incapacity⁵;
 13. (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made⁶;

14. (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case⁷;
15. (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration⁸;
16. (e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place⁹;
17. (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority¹⁰ of the country in which, or under the law of which, it was made¹¹;

(2) if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award¹².

1 As to the meaning of 'New York Convention award' see PARA 1289.

2 Arbitration Act 1996 s 103(1).

3 Arbitration Act 1996 s 103(2). 'In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration. If the award is defective or the arbitration is defectively conducted the party who complains of the defect must in the first instance pursue such remedies as exist under that supervisory jurisdiction': see *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 at 330-331 per Coleman J. See also *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2005] EWHC 9 (Comm), [2005] 1 All ER (Comm) 515, [2005] 1 Lloyd's Rep 515.

4 As to the meaning of 'arbitration agreement' see PARA 1289 note 1.

5 Arbitration Act 1996 s 103(2)(a).

6 Arbitration Act 1996 s 103(2)(b).

7 Arbitration Act 1996 s 103(2)(c). 'The inability to present a case to arbitrators within s 103(2)(c) contemplates at least that the enforcer has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. Where, however, the enforcer has, due to matters within his control, not provided himself with the means of taking advantage of an opportunity given to him to present his case, he does not . . . bring himself within that exception to enforcement under the Convention': *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 at 327 per Coleman J. See also *Kanoria v Guinness* [2006] EWCA Civ 222, [2006] 2 All ER (Comm) 413, [2006] 1 Lloyd's Rep 701 (party unable to present case where not previously informed of case he was required to meet).

8 Arbitration Act 1996 s 103(2)(d). An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted: s 103(4).

9 Arbitration Act 1996 s 103(2)(e).

10 Where an application for the setting aside or suspension of the award has been made to such a competent authority, the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award, and it may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security: Arbitration Act 1996 s 103(5). See *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315. As to security on the adjournment of an application to enforce an award see *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543, [2002] 1 All ER (Comm) 819, [2002] 2 Lloyd's Rep 326. See *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corpn* [2005] EWHC 726 (Comm), [2005] 2 Lloyd's Rep 326 (high value case; adjournment granted subject to condition that person against whom enforcement was sought provided appropriate security within the jurisdiction).

11 Arbitration Act 1996 s 103(2). See *Irvani v Irvani* [2000] 1 Lloyd's Rep 412, CA (no binding award where questions as to the reasoning of the award and the arbitrator's observation of the rules of natural justice were not resolved).

12 Arbitration Act 1996 s 103(3). An applicant under s 103(3) who seeks to show that it would be contrary to public policy to recognise or enforce an award must establish that the award was arrived at by means which were contrary to the requirements of substantial justice contained in English law as set out in *Adams v Cape Industries plc* [1990] Ch 433, [1991] 1 All ER 929, CA. For the factors which must normally be included amongst the relevant considerations where an enforcer alleges that enforcement of an award would be contrary to public policy see *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315.

Where evidence exists that an arbitration award is based on an illegal contract, a preliminary inquiry should be held unless there is sufficient evidence to suggest that such an inquiry will lead to the conclusion that an attempt to re-open the facts should be rebuffed: *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [2000] QB 288, [1999] 3 All ER 864, [1999] 1 All ER (Comm) 865, CA, considering *Soleimany v Soleimany* [1999] QB 785, [1999] 3 All ER 847, CA. See also *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 All ER (Comm) 146, [1999] 2 Lloyd's Rep 222 (there was no justification for refusing recognition and enforcement of the award, although the underlying contract between the parties was illegal in its place of performance). Although it is always open to the court to take an illegality point of its own volition, where a party wishes to rely on matters falling within the Arbitration Act 1996 s 103(3) the burden of making good the objection to enforcement falls upon that party: *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315.

See also *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448, [1988] 1 All ER 513 the effect of which is summarised in *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [2000] QB 288, [1999] 3 All ER 864, [1999] 1 All ER (Comm) 865, CA, per Waller LJ.

UPDATE

1291 Refusal of recognition or enforcement

NOTE 11--See *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755, [2010] 1 All ER 592.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/3. RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS/(2) NEW YORK CONVENTION AWARDS/1292. Procedure for enforcement of awards.

1292. Procedure for enforcement of awards.

An application for permission¹ to enforce an award in the same manner as a judgment or order may be made without notice in an arbitration claim form². The court may specify parties to the arbitration on whom the arbitration claim form must be served³. The parties on whom the arbitration claim form is served must acknowledge service and the enforcement proceedings will continue as if they were an arbitration claim under the Arbitration Act 1996⁴. With the permission of the court the arbitration claim form may be served out of the jurisdiction irrespective of where the award is, or is treated as, made⁵.

Where the applicant applies to enforce an agreed award⁶ the arbitration claim form must state that the award is an agreed award, and any order made by the court must also contain such a statement⁷.

Such an application for permission must be supported by written evidence⁸:

- (1) exhibiting the documents required to be produced⁹;

- (2) stating the name and the usual or last known place of residence or business of the claimant and of the person against whom it is sought to enforce the award¹⁰; and
- (3) stating either that the award has not been complied with, or the extent to which it has not been complied with at the date of the application¹¹.

An order giving permission to enforce an award must be drawn up by the claimant, and must be served on the defendant by delivering a copy to him personally, or by sending a copy to him at his usual or last known place of residence or business¹².

An order giving permission to enforce an award may be served out of the jurisdiction¹³. Within 14 days after service of the order or, if the order is to be served out of the jurisdiction, within such other period as the court may set¹⁴ (a) the defendant may apply to set aside the order¹⁵; and (b) the award must not be enforced until after the end of that period, or any application made by the defendant within that period has been finally disposed of¹⁶. The order must contain a statement of the right to make an application to set the order aside, and the restrictions on enforcement under head (b) above¹⁷.

1 Ie under the Arbitration Act 1996 s 101: see PARA 1290. As to references to the Arbitration Act 1996 see PARA 1283 note 10.

2 CPR 62.18(1)(b). As to the meaning of 'arbitration claim form' see PARA 1284 note 5. As to the procedure for enforcement of awards under the Arbitration Act 1996 s 66, the Arbitration Act 1950 s 26 (now repealed), or the Arbitration Act 1975 s 3(1)(a) (now repealed) see PARAS 1203, 1275. As to the application of CPR Pt 62 Section III (rr 62.17-62.21) see PARA 1275 note 2. As to security for costs see *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2007] EWCA Civ 988, [2008] 1 All ER (Comm) 210.

3 CPR 62.18(2).

4 CPR 62.18(3). The enforcement proceedings will continue as if they were an arbitration claim under CPR Pt 62 Section I (rr 62.2-62.10) (claims under the Arbitration Act 1996): see PARAS 1283-1287.

5 CPR 62.18(4).

6 Ie within the meaning of the Arbitration Act 1996 s 51(2): see PARA 1262.

7 CPR 62.18(5).

8 CPR 62.18(6).

9 See CPR 62.18(6)(a)(ii). As to the documents required to be produced see the Arbitration Act 1996 s 102; and PARA 1290.

10 CPR 62.18(6)(b). Where a body corporate is a party any reference in CPR 62.18 to place of residence or business has effect as if the reference were to the registered or principal address of the body corporate: CPR 62.18(11).

11 CPR 62.18(6)(c).

12 CPR 62.18(7).

13 CPR 62.18(8). It may be served without permission, and in accordance with the rules relating to (1) the method of service where a claim form is to be served out of the jurisdiction (see CPR 6.24); (2) service through foreign governments, judicial authorities and British consular authorities (see CPR 6.25-6.26); (3) service in accordance with EC Council Regulation 1348/2000 (OJ L160, 30.06.2000, p 37) on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (see **CIVIL PROCEDURE** vol 11 (2009) PARA 157 et seq) (see CPR 6.26A); (4) service of a claim form on a state (see CPR 6.27); (5) the translation of a claim form (see CPR 6.28); and (6) the undertaking to be responsible for expenses of the Foreign and Commonwealth Office (see CPR 6.29), as if the order were an arbitration claim form: CPR 62.18(8). See **CIVIL PROCEDURE** vol 11 (2009) PARAS 173-179. As to the Foreign and Commonwealth Office see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 459 et seq.

14 CPR 62.18(9).

15 CPR 62.18(9)(a).

16 CPR 62.18(9)(b).

17 CPR 62.18(10).

UPDATE

1292 Procedure for enforcement of awards

NOTE 13--From 13 November 2008, Regulation 1348/2000 repealed and replaced by European Parliament and EC Council Regulation 1393/2007 (OJ L324, 10.12.2007, p 79) on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (service of documents).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/3. RECOGNITION AND ENFORCEMENT OF FOREIGN AWARDS/(3) ENFORCEMENT BY REGISTRATION OF CERTAIN OVERSEAS AWARDS/1293. Enforcement of overseas awards by registration in the High Court.

(3)

1293. Enforcement of overseas awards by registration in the High Court.

Where:

- (1) an award is made in proceedings on an arbitration in any part of a United Kingdom Overseas Territory¹ or other territory to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933² extends³;
- (2) Part II of the Administration of Justice Act 1920⁴ extended to that part immediately before Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 was extended to that part⁵; and
- (3) an award has, under the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place⁶,

the rules relating to (a) applications for the registration of foreign judgments for enforcement in England and Wales⁷; (b) written evidence in support of applications for registration⁸; (c) applications for security for costs⁹; (d) orders granting permission to register judgments ('registration orders')¹⁰; (e) applications to set aside registration¹¹; and (f) enforcement of judgments¹², apply in relation to the award as they apply in relation to a judgment given by the court subject to modifications¹³.

1 'United Kingdom Overseas Territory' means those territories as set out in the relevant practice direction: CPR 6.18(f).

2 Ie the Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I (ss 1-7): see **CONFLICT OF LAWS**.

3 CPR 62.20(1)(a). As to the application of CPR Pt 62 Section III (rr 62.17-62.21) see PARA 1275 note 2.

4 Ie the Administration of Justice Act 1920 Pt II: see **CONFLICT OF LAWS**.

- 5 CPR 62.20(1)(b).
- 6 CPR 62.20(1)(c).
- 7 Ie CPR 74.1-74.3.
- 8 Ie CPR 74.4. See also **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 173, 192.
- 9 Ie CPR 74.5. See also **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 168, 192.
- 10 Ie CPR 74.6. See also **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 167.
- 11 Ie CPR 74.7.
- 12 Ie CPR 74.9.
- 13 CPR 62.20(1). The modifications referred to in CPR 62.20(1) are set out in CPR 62.20(2).

UPDATE

1293 Enforcement of overseas awards by registration in the High Court

NOTE 1--CPR Pt 6 substituted: SI 2008/2178.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/4. INTERNATIONAL INVESTMENT DISPUTES/(1) CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES/1294. International investment disputes.

4.

(1)

1294. International investment disputes.

Facilities have been provided by the Arbitration (International Investment Disputes) Act 1966 pursuant to the Convention on the Settlement of Investment Disputes (1965)¹ for submission to conciliation² or arbitration³ of disputes relating to international investment. These facilities are open only to contracting states and their nationals⁴. The Act applies the Convention to England⁵ and, with certain exceptions, adaptations and modifications, to Scotland⁶, Northern Ireland⁷ and the following territories⁸: Antigua, Bahamas, Bermuda, British Honduras⁹, British Solomon Islands Protectorate¹⁰, Cayman Islands, Dominica, Falkland Islands, Fiji, Gibraltar, Gilbert and Ellice Islands Colony¹¹, Grenada, Guernsey, Hong Kong, Jersey, Mauritius, Montserrat, St Christopher, Nevis and Anguilla, St Helena, St Lucia, St Vincent, Seychelles, Swaziland, Tonga, Turks and Caicos Islands, and the Virgin Islands¹².

1 Ie the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; Cmnd 3255). The Convention is set out in the Schedule to the Arbitration (International Investment Disputes) Act 1966: s 1(1). The Convention is referred to as the Convention on the Settlement of Investment Disputes or, simply, the Convention. The purpose of the Convention is to promote an atmosphere of mutual confidence between states and foreign investors, thus stimulating a larger flow of private international capital into countries which ratify it, and to safeguard the interests of private investors, including companies, who, unlike states, have no recourse to the International Court of Justice.

2 Ie the Arbitration (International Investment Disputes) Act 1966 s 1, Schedule Ch III (arts 28-35).

3 le the Arbitration (International Investment Disputes) Act 1966 Schedule Ch IV (arts 36-55).

4 See the Arbitration (International Investment Disputes) Act 1966 Schedule art 25(1); and PARA 1296. As to disputes between contracting states concerning the interpretation or application of the Convention see Schedule art 64. As to the procedure for amending the Convention see Schedule arts 65-66.

5 See the Arbitration (International Investment Disputes) Act 1966 ss 1, 9 (s 1 amended by the Administration of Justice Act 1977 ss 4(1), (2), (4), 32(4), Sch 5; and the Supreme Court Act 1981 s 152(1), Sch 5); and the Arbitration (International Investment Disputes) Act 1966 (Commencement) Order 1966, SI 1966/1597.

6 See the Arbitration (International Investment Disputes) Act 1966 s 7.

7 Arbitration (International Investment Disputes) Act 1966 s 8 (amended by the Judicature (Northern Ireland) Act 1978 s 122(1), Sch 5).

8 See the Arbitration (International Investment Disputes) Act 1966 s 6.

9 le now Belize: see **COMMONWEALTH** vol 13 (2009) PARA 741.

10 le now Solomon Islands: see **COMMONWEALTH** vol 13 (2009) PARA 779.

11 le now Kiribati and Tuvalu: see **COMMONWEALTH** vol 13 (2009) PARAS 758, 786.

12 See the Arbitration (International Investment Disputes) Act 1966 (Application to Colonies, etc) Order 1967, SI 1967/159 (amended by SI 1967/249); the Arbitration (International Investment Disputes) Act 1966 (Application to Tonga) Order 1967, SI 1967/585; the Arbitration (International Investment Disputes) (Guernsey) Order 1968, SI 1968/1199; and the Arbitration (International Investment Disputes) (Jersey) Order 1979, SI 1979/572.

UPDATE

1294 International investment disputes

NOTE 5--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/4. INTERNATIONAL INVESTMENT DISPUTES/(2) INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES/1295. Organisation.

(2)

1295. Organisation.

Facilities for conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states in accordance with the provisions of the Convention on the Settlement of Investment Disputes (1965)¹ are provided by the International Centre for Settlement of Investment Disputes². The seat of the Centre is at the principal office of the International Bank for Reconstruction and Development³, and it has an administrative council⁴ and a secretariat⁵. The secretariat includes a Secretary-General (and deputy or deputies)⁶, who performs the function of registrar and who has power to authenticate arbitral awards rendered pursuant to the Convention, and to certify copies thereof⁷. The Centre maintains a panel of conciliators and a panel of arbitrators⁸. The members of the panels are qualified persons who are willing to serve on them⁹ designated by the contracting states and by the president of the bank¹⁰ who is ex officio chairman of the administrative council¹¹.

- 1 le the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; Cmnd 3255): see PARA 1294. The Convention is set out in the Schedule to the Arbitration (International Investment Disputes) Act 1966: s 1(1).
- 2 Arbitration (International Investment Disputes) Act 1966 s 1, Schedule art 1. As to the expenditure of the Centre see s 5, Schedule art 17.
- 3 Arbitration (International Investment Disputes) Act 1966 Schedule art 2. The International Centre for Settlement of Investment Disputes is based in Washington. Arbitration and conciliation proceedings are held at the seat of the Centre (Schedule art 62), but the parties may agree to hold the proceedings at the seat of the Permanent Court of Arbitration at The Hague, or some other approved place (Schedule art 63).
- 4 Arbitration (International Investment Disputes) Act 1966 Schedule art 3. The administrative council consists of one representative (with an alternate representative) of each contracting state; that representative (and alternate) is, in the absence of contrary designation, the governor appointed by the state to the bank: see Schedule art 4. The administrative council adopts the financial and administrative regulations of the Centre, and the rules for the institution and conduct of arbitrations and conciliations under the Convention: see Schedule art 6. Members of the administrative council receive no remuneration from the Centre: Schedule art 8. As to meetings, voting and the number needed for a quorum see Schedule art 7.
- 5 See the Arbitration (International Investment Disputes) Act 1966 Schedule arts 3, 9-11.
- 6 Arbitration (International Investment Disputes) Act 1966 Schedule art 9. As to the appointment and qualification of the Secretary-General and deputy, and the carrying out by a deputy of the Secretary-General's functions during his absence or incapacity, see Schedule art 10.
- 7 Arbitration (International Investment Disputes) Act 1966 Schedule art 11.
- 8 Arbitration (International Investment Disputes) Act 1966 Schedule art 3.
- 9 Arbitration (International Investment Disputes) Act 1966 Schedule art 12. As to the qualities required of persons designated to serve see Schedule art 14.
- 10 See the Arbitration (International Investment Disputes) Act 1966 Schedule art 13. The term of office of a member of a panel is a renewable period of six years: see Schedule art 15(1). As to the death or resignation of a member of a panel see Schedule art 15(2), (3). A person may serve on both panels: see Schedule art 16.
- 11 See the Arbitration (International Investment Disputes) Act 1966 Schedule art 5.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/4. INTERNATIONAL INVESTMENT DISPUTES/(2) INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES/1296. Jurisdiction.

1296. Jurisdiction.

The jurisdiction of the International Centre for Settlement of Investment Disputes¹ extends to any legal dispute arising directly out of an investment, between a contracting state (or any designated constituent sub-division or agency thereof) and a national of another contracting state, which the parties to the dispute consent in writing to submit to the Centre². 'National of another contracting state' means (1) any natural person who had the nationality of a contracting state other than the state party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered³, but does not include any person who on either date also had the nationality of the contracting state party to the dispute⁴; and (2) any juridical person who had the nationality of a contracting state other than the state party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person who had the nationality of the contracting state party to the dispute on that

date and who, because of foreign control, the parties have agreed should be treated as a national of another contracting state for the purposes of the Convention on the Settlement of Investment Disputes (1965)⁵.

The submission to the procedures of the Convention must be by mutual agreement⁶, but once agreement is given, it may not be withdrawn unilaterally⁷. Consent of the parties to arbitration under the Convention is, unless otherwise stated, deemed to be consent to such arbitration to the exclusion of any other remedy⁸. A contracting state must not give diplomatic protection⁹ or bring an international claim in respect of a dispute where one of its nationals and another contracting state have submitted or consented to arbitration under the Convention unless that other state has failed to abide by and comply with the award rendered in the dispute¹⁰.

Any contracting state may, at the time of ratification, acceptance or approval of the Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre¹¹. The Secretary-General¹² must forthwith transmit such notification to all contracting states¹³.

1 As to the organisation of the International Centre for Settlement of Investment Disputes see PARA 1295.

2 Arbitration (International Investment Disputes) Act 1966 s 1, Schedule art 25(1).

3 le pursuant to the Arbitration (International Investment Disputes) Act 1966 Schedule art 28(3) or art 36(3): see PARA 1298.

4 Arbitration (International Investment Disputes) Act 1966 Schedule art 25(2)(a).

5 Arbitration (International Investment Disputes) Act 1966 Schedule art 25(2)(b). The Convention referred to in the text is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; Cmnd 3255): see PARA 1294. The Convention is set out in the Schedule to the Arbitration (International Investment Disputes) Act 1966: s 1(1).

6 See the Arbitration (International Investment Disputes) Act 1966 Schedule arts 25(1), (3), 28(2), 36(2).

7 Arbitration (International Investment Disputes) Act 1966 Schedule art 25(1).

8 Arbitration (International Investment Disputes) Act 1966 Schedule art 26. A contracting state may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention: Schedule art 26.

9 For the purposes of the Arbitration (International Investment Disputes) Act 1966 Schedule art 27(1), diplomatic protection does not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute: Schedule art 27(2).

10 Arbitration (International Investment Disputes) Act 1966 Schedule art 27(1).

11 Arbitration (International Investment Disputes) Act 1966 Schedule art 25(4).

12 As to the Secretary-General see PARA 1295.

13 Arbitration (International Investment Disputes) Act 1966 Schedule art 25(4). Such notification does not constitute the consent required by Schedule art 25(1): Schedule art 25(4).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/4. INTERNATIONAL INVESTMENT DISPUTES/(2) INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES/1297. Status, immunities and privileges.

1297. Status, immunities and privileges.

The International Centre for Settlement of Investment Disputes¹ has full international legal personality including capacity to contract, buy and sell property, and institute legal proceedings². The Centre, its property and assets are immune from all legal process save where immunity is waived by a statement certified by the Secretary-General³. Its archives are inviolable⁴. It is exempt from taxation and customs duties, with certain exceptions as to customs duties on goods for resale, and duties or taxes which form part of the price of goods or are no more than charges for services rendered⁵.

The chairman and other members of the administrative council, persons acting as conciliators or arbitrators or members of a committee appointed to consider whether or not an award should be annulled, persons appearing in proceedings under the Convention on the Settlement of Investment Disputes (1965)⁶ as parties, agents, counsel, advocates, witnesses or experts, and the officers and employees of the secretariat enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except where the Centre waives this immunity in a statement certified by the Secretary-General⁷.

1 As to the organisation of the International Centre for Settlement of Investment Disputes see PARA 1295.

2 Arbitration (International Investment Disputes) Act 1966 ss 1, 4(1), Schedule art 18. See generally **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 488.

3 See the Arbitration (International Investment Disputes) Act 1966 s 4(1), (3), Schedule art 20. As to the Secretary-General see PARA 1295.

4 Arbitration (International Investment Disputes) Act 1966 s 4(1), Schedule art 23(1).

5 See the Arbitration (International Investment Disputes) Act 1966 s 4(1), (2), Schedule art 24(1).

6 I.e the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; Cmnd 3255): see PARA 1294. The Convention is set out in the Schedule to the Arbitration (International Investment Disputes) Act 1966: s 1(1).

7 See the Arbitration (International Investment Disputes) Act 1966 s 4(1), (3), Schedule arts 21(a), 22, 52(3).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/4. INTERNATIONAL INVESTMENT DISPUTES/(3) THE ARBITRAL TRIBUNAL AND THE ARBITRATION/1298. Request for arbitration.

(3)

1298. Request for arbitration.

When a dispute has been submitted to arbitration under the Convention on the Settlement of Investment Disputes (1965)¹, legal proceedings may be stayed².

Arbitration under the Convention is initiated by one of the parties giving to the Secretary-General³ a written request⁴ containing information concerning the issues in dispute, the identity of the parties and their consent to arbitration⁵. The Secretary-General sends a copy of the request to the other party⁶, and registers the request, sending notice of the registration to the parties⁷. If, however, the dispute is manifestly outside the jurisdiction of the International Centre for Settlement of Investment Disputes⁸, he must refuse to register the request and must notify the parties accordingly⁹.

1 le the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; Cmnd 3255): see PARA 1294. The Convention is set out in the Schedule to the Arbitration (International Investment Disputes) Act 1966: s 1(1).

2 See the Arbitration (International Investment Disputes) Act 1966 s 3(2) (s 3 substituted by the Arbitration Act 1996 s 107(1), Sch 3 para 24); the Arbitration Act 1996 s 9; and PARA 1222. As to the application of provisions of the Arbitration Act 1996 to proceedings pursuant to the Convention see PARA 1300.

3 As to the Secretary-General see PARA 1295.

4 Arbitration (International Investment Disputes) Act 1966 s 1, Schedule art 36(1).

5 Arbitration (International Investment Disputes) Act 1966 Schedule art 36(2).

6 Arbitration (International Investment Disputes) Act 1966 Schedule art 36(1).

7 Arbitration (International Investment Disputes) Act 1966 Schedule art 36(3).

8 As to the organisation of the International Centre for Settlement of Investment Disputes see PARA 1295.

9 Arbitration (International Investment Disputes) Act 1966 Schedule art 36(3).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/4. INTERNATIONAL INVESTMENT DISPUTES/(3) THE ARBITRAL TRIBUNAL AND THE ARBITRATION/1299. The arbitral tribunal.

1299. The arbitral tribunal.

As soon as possible after registration of a request for arbitration, an arbitral tribunal must be constituted¹, consisting of a sole arbitrator or any uneven number of arbitrators as the parties agree² or, in default of agreement, three arbitrators, one appointed by each party and the third, who functions as president of the tribunal, appointed by agreement of the parties³. If, however, the tribunal has not been constituted within 90 days after the dispatch of notice of registration of the request⁴, or such other period as the parties may agree, the chairman⁵, at the request of either party and after consulting both parties as far as possible, must appoint any arbitrator not yet appointed⁶. The parties, though not the chairman, may appoint persons not on the panel of arbitrators⁷, provided they have the qualities needed by panel members⁸. Provision is made for the replacement of arbitrators who cannot act⁹.

The arbitral tribunal is the judge of its own competence¹⁰ and jurisdiction¹¹, and decides disputes in accordance with such rules of law or equity as the parties agree¹². In the absence of agreement the tribunal applies the law of the contracting state party, including its rules on the conflict of laws, and such rules of international law as may be applicable¹³. It may not bring in a finding of non liquet¹⁴ on the ground of silence or obscurity of the law¹⁵.

1 Arbitration (International Investment Disputes) Act 1966 s 1, Schedule art 37(1).

2 Arbitration (International Investment Disputes) Act 1966 Schedule art 37(2)(a).

3 Arbitration (International Investment Disputes) Act 1966 Schedule art 37(2)(b).

4 le in accordance with the Arbitration (International Investment Disputes) Act 1966 Schedule art 36(3): see PARA 1298.

5 le the chairman of the administrative council: see PARA 1295.

6 Arbitration (International Investment Disputes) Act 1966 Schedule art 38. Arbitrators appointed by the chairman must not be co-nationals of either party (Schedule art 38), and, except in the case of agreed appointments, the majority of the arbitrators must not be co-nationals of the parties (Schedule art 39).

7 Arbitration (International Investment Disputes) Act 1966 Schedule art 40(1). As to the panel of arbitrators and its members see PARA 1295.

8 Arbitration (International Investment Disputes) Act 1966 Schedule art 40(2).

9 See the Arbitration (International Investment Disputes) Act 1966 Schedule arts 56-58.

10 Arbitration (International Investment Disputes) Act 1966 Schedule art 41(1).

11 See the Arbitration (International Investment Disputes) Act 1966 Schedule art 41(2).

12 See the Arbitration (International Investment Disputes) Act 1966 Schedule art 42(1), (3). As to the determination by the tribunal of incidental and additional claims or counter-claims see Schedule art 46.

13 Arbitration (International Investment Disputes) Act 1966 Schedule art 42(1). As to conflict of laws see generally **CONFLICT OF LAWS**.

14 Ie 'it is not clear'.

15 Arbitration (International Investment Disputes) Act 1966 Schedule art 42(2).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/4. INTERNATIONAL INVESTMENT DISPUTES/(3) THE ARBITRAL TRIBUNAL AND THE ARBITRATION/1300. The arbitration.

1300. The arbitration.

The arbitration is conducted in accordance with the Convention on the Settlement of Investment Disputes (1965)¹, the arbitration rules in effect on the date when the parties consented to arbitration, rules agreed by the parties, and, if the point is otherwise uncovered, in accordance with the arbitral tribunal's own rules². The Arbitration Act 1996 does not apply to proceedings pursuant to the Convention³, but the Lord Chancellor⁴ may by order direct that provisions concerning the conduct of arbitral proceedings⁵ are to apply⁶.

Except as the parties otherwise agree, the tribunal may at any stage of the proceedings call for the production of documents or other evidence⁷, visit the scene connected with the dispute and conduct inquiries there⁸, and recommend any provisional measures which should be taken to preserve the rights of either party⁹.

Failure of a party to appear or present his case is not deemed an admission of the other party's assertions¹⁰, but the other party may, on such failure, request the tribunal to deal with the questions submitted and render an award¹¹. Before rendering such an award the tribunal must notify, and grant a period of grace to, the party in default unless satisfied that the default will continue¹².

1 Ie the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; Cmnd 3255): see PARA 1294. The Convention is set out in the Schedule to the Arbitration (International Investment Disputes) Act 1966: s 1(1).

2 Arbitration (International Investment Disputes) Act 1966 s 1, Schedule art 44. As to the arbitral tribunal see PARA 1299.

3 Arbitration (International Investment Disputes) Act 1966 s 3(2) (s 3 substituted by the Arbitration Act 1996 s 107(1), Sch 3 para 24). However, this does not affect the application of the Arbitration Act 1996 s 9 (stay

of legal proceedings in respect of matter subject to arbitration: see PARAS 1222, 1298): see the Arbitration (International Investment Disputes) Act 1966 s 3(2) (as so substituted).

4 As to the Lord Chancellor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq.

5 le the provisions of the Arbitration Act 1996 ss 36, 38-44: see PARAS 1244, 1246, 1248, 1250, 1252-1254, 1257.

6 Arbitration (International Investment Disputes) Act 1966 s 3(1) (s 3 as substituted: see note 3). Such an order may be varied or revoked by a subsequent order so made (s 3(3)(a) (as so substituted)), and must be made by statutory instrument (s 3(3)(b) (as so substituted)). At the date at which this volume states the law no such order had been made.

7 Arbitration (International Investment Disputes) Act 1966 Schedule art 43(a).

8 Arbitration (International Investment Disputes) Act 1966 Schedule art 43(b).

9 Arbitration (International Investment Disputes) Act 1966 Schedule art 47.

10 Arbitration (International Investment Disputes) Act 1966 Schedule art 45(1).

11 Arbitration (International Investment Disputes) Act 1966 Schedule art 45(2).

12 Arbitration (International Investment Disputes) Act 1966 Schedule art 45(2).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/4. INTERNATIONAL INVESTMENT DISPUTES/(4) RECOGNITION, ENFORCEMENT AND REGISTRATION OF THE AWARD/(i) The Award/1301. The award.

(4)

(i) The Award

1301. The award.

The arbitral tribunal's¹ award, which must deal with every question submitted and state the reasons on which it is based², is decided by a majority vote³. It must be in writing, signed by the members of the tribunal who voted for it⁴. Any tribunal member may attach to the award his individual opinion, whether he dissents from the majority or not, or a statement of his dissent⁵. For purposes of enforcement in the United Kingdom, 'award' includes any decision interpreting, revising or annulling an award and any decision as to costs which is to form part of the award⁶.

Unless the parties otherwise agree, the tribunal assesses the expenses of the parties and decides as part of the award how and by whom those expenses and those of the International Centre for Settlement of Investment Disputes⁷ (as determined by the Secretary-General⁸) and the tribunal (as determined by the tribunal or as agreed in advance with the tribunal) are to be borne⁹.

The Centre must not publish the award unless the parties consent¹⁰. The Secretary-General must promptly dispatch certified copies of the award to the parties, and the award is deemed to have been rendered on the date when the certified copies were dispatched¹¹. A decision on rectification of the award¹² becomes part of the award and must be notified to the parties in the same manner as the award¹³.

Certain time limits with regard to the revision and annulment of the award by the Centre run from the date on which the award was rendered¹⁴. However, in cases where there has been a decision on rectification these time limits run from the date on which that decision was

rendered¹⁵ and this date is, it seems, the date on which notification of that decision was dispatched to the parties. The expression 'date of the award' is used to refer to whichever of these dates is applicable.

- 1 As to the arbitral tribunal see PARA 1299.
- 2 Arbitration (International Investment Disputes) Act 1966 s 1, Schedule art 48(3).
- 3 Arbitration (International Investment Disputes) Act 1966 Schedule art 48(1).
- 4 Arbitration (International Investment Disputes) Act 1966 Schedule art 48(2).
- 5 Arbitration (International Investment Disputes) Act 1966 Schedule art 48(4).
- 6 Arbitration (International Investment Disputes) Act 1966 s 1(7)(a).
- 7 As to the organisation of the International Centre for Settlement of Investment Disputes see PARA 1295.
- 8 As to the Secretary-General see PARA 1295.
- 9 See the Arbitration (International Investment Disputes) Act 1966 Schedule arts 59-61.
- 10 Arbitration (International Investment Disputes) Act 1966 Schedule art 48(5).
- 11 Arbitration (International Investment Disputes) Act 1966 s 1(7)(b), Schedule art 49(1).
- 12 As to rectification of awards see PARA 1302.
- 13 See the Arbitration (International Investment Disputes) Act 1966 Schedule art 49(2).
- 14 See the Arbitration (International Investment Disputes) Act 1966 Schedule arts 49(2), 51(2), 52(2); and PARA 1302.
- 15 See the Arbitration (International Investment Disputes) Act 1966 Schedule art 49(2).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/4. INTERNATIONAL INVESTMENT DISPUTES/(4) RECOGNITION, ENFORCEMENT AND REGISTRATION OF THE AWARD/(i) The Award/1302. Rectification, interpretation, revision and annulment of the award.

1302. Rectification, interpretation, revision and annulment of the award.

On the request of a party made within 45 days after the date of the award¹, the arbitral tribunal² may, after notice to the other party, decide any question it had omitted to decide in the award, and must rectify any clerical, arithmetical or similar error in the award³. Its decision becomes part of the award⁴.

If any dispute arises between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General⁵. The request is, if possible, submitted to the tribunal which rendered the award; if that is not possible a new tribunal is constituted in the normal way⁶. The tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision⁷.

Either party may apply in writing to the Secretary-General to have the award reviewed on the ground of fresh, decisive evidence unknown to the tribunal and unknown to the applicant (otherwise than by negligence) at the date the award was rendered⁸. The application must be

made within 90 days after disclosure of the evidence and in any event within three years after the date of the award⁹. The application is, if possible, submitted to the tribunal which rendered the award; if that is not possible, a new tribunal is constituted in the normal way¹⁰. The tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision¹¹. If the applicant requests a stay in his application, enforcement is stayed provisionally until the tribunal rules on the request¹².

Either party may by written application to the Secretary-General made within 120 days after the date of the award¹³, and in any event within three years after the date of the award, request annulment of the award on one or more of the following grounds¹⁴:

- (1) that the tribunal was not properly constituted¹⁵;
- (2) that the tribunal manifestly exceeded its powers¹⁶;
- (3) that there was corruption on the part of a member of the tribunal¹⁷;
- (4) that there was a serious departure from a fundamental rule of procedure¹⁸;
- or
- (5) that the award failed to state the reasons on which it was based¹⁹.

Such requests are dealt with by an ad hoc committee of three persons chosen by the chairman from the panel of arbitrators²⁰, not being members of the original tribunal, co-nationals of the parties or members of the original tribunal, persons designated to the panel by the states of the parties, or persons who have acted as conciliators in the same dispute²¹. The procedure is mutatis mutandis the same as in the original arbitration²². The committee may, if it considers that circumstances so require, stay enforcement of the award pending its decision²³. If the applicant requests a stay of enforcement of the award in his application, enforcement is stayed provisionally until the committee rules on the request²⁴.

If the award is annulled, the dispute must, at the request of either party, be submitted to a new tribunal constituted in the normal way²⁵.

1 As to the date of the award see PARA 1301.

2 As to the arbitral tribunal see PARA 1299.

3 Arbitration (International Investment Disputes) Act 1966 s 1, Schedule art 49(2).

4 Arbitration (International Investment Disputes) Act 1966 Schedule art 49(2).

5 Arbitration (International Investment Disputes) Act 1966 Schedule art 50(1). As to the Secretary-General see PARA 1295.

6 Arbitration (International Investment Disputes) Act 1966 Schedule art 50(2). As to the constitution of the tribunal see PARA 1299.

7 Arbitration (International Investment Disputes) Act 1966 Schedule art 50(2).

8 See the Arbitration (International Investment Disputes) Act 1966 Schedule art 51(1). As to the date the award was rendered see PARA 1301.

9 Arbitration (International Investment Disputes) Act 1966 Schedule art 51(2).

10 See the Arbitration (International Investment Disputes) Act 1966 Schedule art 51(3).

11 Arbitration (International Investment Disputes) Act 1966 Schedule art 51(4).

12 Arbitration (International Investment Disputes) Act 1966 Schedule art 51(4).

13 See the Arbitration (International Investment Disputes) Act 1966 Schedule art 52(2). See also note 17.

14 See the Arbitration (International Investment Disputes) Act 1966 Schedule art 52(1), (2).

- 15 Arbitration (International Investment Disputes) Act 1966 Schedule art 52(1)(a).
- 16 Arbitration (International Investment Disputes) Act 1966 Schedule art 52(1)(b).
- 17 Arbitration (International Investment Disputes) Act 1966 Schedule art 52(1)(c). In this case, the application must be made within 120 days after the discovery of the corruption, and in any event it must be made within three years after the date of the award: see Schedule art 52(2).
- 18 Arbitration (International Investment Disputes) Act 1966 Schedule art 52(1)(d).
- 19 Arbitration (International Investment Disputes) Act 1966 Schedule art 52(1)(e). The award is required to state the reasons on which it is based: see Schedule art 48(3); and PARA 1301.
- 20 As to the chairman of the administrative council see PARA 1295. As to the panel of arbitrators and its members see PARA 1295.
- 21 See the Arbitration (International Investment Disputes) Act 1966 Schedule art 52(3).
- 22 Arbitration (International Investment Disputes) Act 1966 Schedule art 52(4) (applying Schedule arts 41-45, 48, 49, 53, 54: see PARAS 1299-1301, 1303).
- 23 Arbitration (International Investment Disputes) Act 1966 Schedule art 52(5).
- 24 Arbitration (International Investment Disputes) Act 1966 Schedule art 52(5).
- 25 See the Arbitration (International Investment Disputes) Act 1966 Schedule art 52(6).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/4. INTERNATIONAL INVESTMENT DISPUTES/(4) RECOGNITION, ENFORCEMENT AND REGISTRATION OF THE AWARD/(ii) Recognition and Enforcement/1303. Recognition and enforcement of the award under the Convention.

(ii) Recognition and Enforcement

1303. Recognition and enforcement of the award under the Convention.

The award¹ is binding on the parties and is not subject to any appeal or to any other remedy except as provided for in the Convention on the Settlement of Investment Disputes (1965)². Each contracting state recognises an award as binding and enforces the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court of that state³. A party seeking recognition or enforcement in the territories of a contracting state must furnish to a competent court or other authority which that state has designated for this purpose a copy of the award certified by the Secretary-General⁴. Execution of the award is governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought⁵.

1 For these purposes, 'award' includes any decision interpreting, revising or annulling such an award pursuant to the Arbitration (International Investment Disputes) Act 1966 s 1, Schedule art 50, art 51 or art 52 (see PARA 1302): Schedule art 53(2).

2 Arbitration (International Investment Disputes) Act 1966 Schedule art 53(1). The Convention referred to in the text is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; Cmnd 3255): see PARA 1294. The Convention is set out in the Schedule to the Arbitration (International Investment Disputes) Act 1966: s 1(1). Each party must abide by and comply with the terms of the award except to the extent that enforcement has been stayed pursuant to the relevant provisions of the Convention: Arbitration (International Investment Disputes) Act 1966 Schedule art 53(1).

Nothing in Schedule art 54 is to be construed as derogating from the law in force in any contracting state relating to immunity of that state or of any foreign state from execution: Schedule art 55.

3 Arbitration (International Investment Disputes) Act 1966 Schedule art 54(1).

4 Arbitration (International Investment Disputes) Act 1966 Schedule art 54(2). Each contracting state must notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation: Schedule art 54(2). As to the Secretary-General see PARA 1295.

5 Arbitration (International Investment Disputes) Act 1966 Schedule art 54(3).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/4. INTERNATIONAL INVESTMENT DISPUTES/(4) RECOGNITION, ENFORCEMENT AND REGISTRATION OF THE AWARD/(ii) Recognition and Enforcement/1304. Recognition and enforcement of the award in the United Kingdom.

1304. Recognition and enforcement of the award in the United Kingdom.

A person seeking recognition or enforcement of an award is entitled to have the award registered in the High Court¹.

An award is enforceable against the Crown in any manner in which a judgment would be enforceable against the Crown².

1 Arbitration (International Investment Disputes) Act 1966 s 1(2). This is subject to proof of the prescribed matters and to the other provisions of the Arbitration (International Investment Disputes) Act 1966: s 1(2). For the purposes of ss 1, 2, 'prescribed' means prescribed by rules of court: s 1(6). As to the meaning of 'High Court' see PARA 1213 note 12.

2 See the Arbitration (International Investment Disputes) Act 1966 s 1(8). As to the application of statutes to the Crown see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 384.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/4. INTERNATIONAL INVESTMENT DISPUTES/(4) RECOGNITION, ENFORCEMENT AND REGISTRATION OF THE AWARD/(iii) Registration/1305. Registration of the award generally.

(iii) Registration

1305. Registration of the award generally.

The award is registered in respect of the pecuniary obligations imposed by the award and for the reasonable costs of and incidental to registration¹. However, if at the date of the application for registration the pecuniary obligations have been partly satisfied, the award can be registered only in respect of the balance, and if those obligations have been wholly satisfied, the award cannot be registered².

1 Arbitration (International Investment Disputes) Act 1966 s 1(4).

2 Arbitration (International Investment Disputes) Act 1966 s 1(5).

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/4. INTERNATIONAL INVESTMENT DISPUTES/(4) RECOGNITION, ENFORCEMENT AND REGISTRATION OF THE AWARD/(iii) Registration/1306. Effect of registration of the award.

1306. Effect of registration of the award.

The monetary obligations imposed by an award¹ have the same force and effect for the purposes of execution as a judgment of the High Court² given when the award was rendered pursuant to the Convention on the Settlement of Investment Disputes (1965)³ and entered on the date of registration under the Arbitration (International Investment Disputes) Act 1966, and, so far as relates to such monetary obligations⁴:

- (1) proceedings may be taken on the award⁵;
- (2) the sum for which the award is registered carries interest⁶; and
- (3) the High Court has the same control over the execution of the award⁷,

as if the award had been such a judgment of the High Court⁸.

Rules of court⁹ may contain provisions requiring the court on proof of the prescribed¹⁰ matters to stay execution of any award registered under the Arbitration (International Investment Disputes) Act 1966 so as to take account of cases where enforcement of the award has been stayed (whether provisionally or otherwise) pursuant to the Convention, and may provide for the provisional stay of execution of the award where an application is made pursuant to the Convention which, if granted, might result in a stay of enforcement of the award¹¹.

¹ Ie an award registered under the Arbitration (International Investment Disputes) Act 1966 s 1: see PARA 1301.

² As to the meaning of 'High Court' see PARA 1213 note 12.

³ Ie the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; Cmnd 3255): see PARA 1294. The Convention is set out in the Schedule to the Arbitration (International Investment Disputes) Act 1966: s 1(1).

⁴ Arbitration (International Investment Disputes) Act 1966 s 2(1).

⁵ Arbitration (International Investment Disputes) Act 1966 s 2(1)(a).

⁶ Arbitration (International Investment Disputes) Act 1966 s 2(1)(b). As to interest on judgment debts see **CIVIL PROCEDURE** vol 12 (2009) PARA 1149.

⁷ Arbitration (International Investment Disputes) Act 1966 s 2(1)(c).

⁸ Arbitration (International Investment Disputes) Act 1966 s 2(1).

⁹ Ie under the Supreme Court Act 1981 s 84: see **COURTS** vol 10 (Reissue) PARAS 577-578. As from a day to be appointed, the Supreme Court Act 1981 is to be cited as the Senior Courts Act 1981: see the Constitutional Reform Act 2005 s 59(5), Sch 11 para 1(1) (to be brought into force by an order under s 148(1)). At the date at which this volume states the law, no such day had been appointed. As to the meaning of 'rules of court' see PARA 1221 note 7.

¹⁰ As to the meaning of 'prescribed' see PARA 1304 note 1.

¹¹ Arbitration (International Investment Disputes) Act 1966 s 2(1) (amended by the Supreme Court Act 1981 s 152(1), Sch 5). The power to make rules of court under the Supreme Court Act 1981 s 84 (see **COURTS** vol 10 (Reissue) PARAS 577-578) includes power to:

- (1) prescribe the procedure for applying for registration under the Arbitration (International Investment Disputes) Act 1966 s 1, and to require an applicant to give prior notice of his intention to other parties (s 1(6)(a) (s 1(6) amended by the Supreme Court Act 1981 s 152(1), Sch 5));
- (2) prescribe the matters to be proved on the application and the manner of proof, and in particular to require the applicant to furnish a copy of the award certified pursuant to the Convention (Arbitration (International Investment Disputes) Act 1966 s 1(6)(b) (as so amended));
- (3) provide for the service of notice of registration of the award by the applicant on other parties (s 1(6)(c) (as so amended)).

UPDATE

1306 Effect of registration of the award

NOTE 9--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/ARBITRATION (VOLUME 2 (2008) 5TH EDITION)/4. INTERNATIONAL INVESTMENT DISPUTES/(4) RECOGNITION, ENFORCEMENT AND REGISTRATION OF THE AWARD/(iii) Registration/1307. Procedure for registration of awards under the Arbitration (International Investment Disputes) Act 1966.

1307. Procedure for registration of awards under the Arbitration (International Investment Disputes) Act 1966.

An application to have an award under the Convention on the Settlement of Investment Disputes (1965)¹ registered in the High Court² must be made in accordance with the Part 8 procedure³ of the Civil Procedure Rules⁴.

Subject to the provisions of the registration of awards under the Arbitration (International Investment Disputes) Act 1966⁵, the provisions of Part 74 of the Civil Procedure Rules relating to:

- (1) applications for the registration of foreign judgments for enforcement in England and Wales⁶;
- (2) written evidence in support of applications for registration⁷;
- (3) orders granting permission to register judgments ('registration orders')⁸; and
- (4) the filing of evidence of service on the judgment debtor⁹ of the registration order and any other relevant order of the court by any party wishing to enforce a judgment¹⁰,

apply with such modifications as may be necessary in relation to an award as they apply in relation to a judgment to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933¹¹ applies¹².

Where, on granting permission to register an award or an application made by the judgment debtor after an award has been registered, the court considers¹³ (a) that the enforcement of the award has been stayed (whether provisionally or otherwise) under the Convention¹⁴; or (b) that an application has been made under the Convention which, if granted, might result in a stay of the enforcement of the award¹⁵, the court may stay the enforcement of the award for such time as it considers appropriate¹⁶.

Awards ordered to be registered under the Arbitration (International Investment Disputes) Act 1966 and particulars will be entered in the register kept for that purpose at the Admiralty and Commercial Registry¹⁷.

1 Ie the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965; Cmnd 3255) (see PARA 1294); see CPR 62.21(1)(b), (c). The Convention is set out in the Schedule to the Arbitration (International Investment Disputes) Act 1966: s 1(1).

2 Ie under the Arbitration (International Investment Disputes) Act 1966 s 1: see PARA 1294.

3 The provisions of CPR Pt 8 provide for an alternative procedure for starting claims: see **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq.

4 CPR 62.21(3). As to the application of CPR Pt 62 Section III (rr 62.17-62.21) see PARA 1275 note 2.

5 Ie CPR 62.21.

6 Ie CPR 74.1, CPR 74.3.

7 Ie CPR 74.4(1), (2)(a)-(d), (4).

The written evidence required by CPR 74.4 in support of an application for registration must (1) exhibit the award certified under the Convention instead of the judgment (or a copy of it) (CPR 62.21(4)(a)); and (2) in addition to stating the matters referred to in CPR 74.4(2)(a)-(d), state whether (a) at the date of the application the enforcement of the award has been stayed (provisionally or otherwise) under the Convention (CPR 62.21(4)(b)(i)); and (b) any, and if so what, application has been made under the Convention, which, if granted, might result in a stay of the enforcement of the award (CPR 62.21(4)(b)(ii)).

8 Ie CPR 74.6 (except CPR 74.6(3)(c)-(e) ; see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 167).

9 'Judgment creditor' means the person seeking recognition or enforcement of an award: CPR 62.21(1)(d). 'Judgment debtor' means the other party to the award: CPR 62.21(1)(e).

10 Ie CPR 74.9(2).

11 Ie the Foreign Judgments (Reciprocal Enforcement) Act 1933 Pt I (ss 1-7): see **CONFLICT OF LAWS**.

12 CPR 62.21(2).

13 CPR 62.21(5).

14 CPR 62.21(5)(a).

15 CPR 62.21(5)(b).

16 CPR 62.21(5).

17 Practice Direction--Arbitration PD62 paras 15.1, 16.1.